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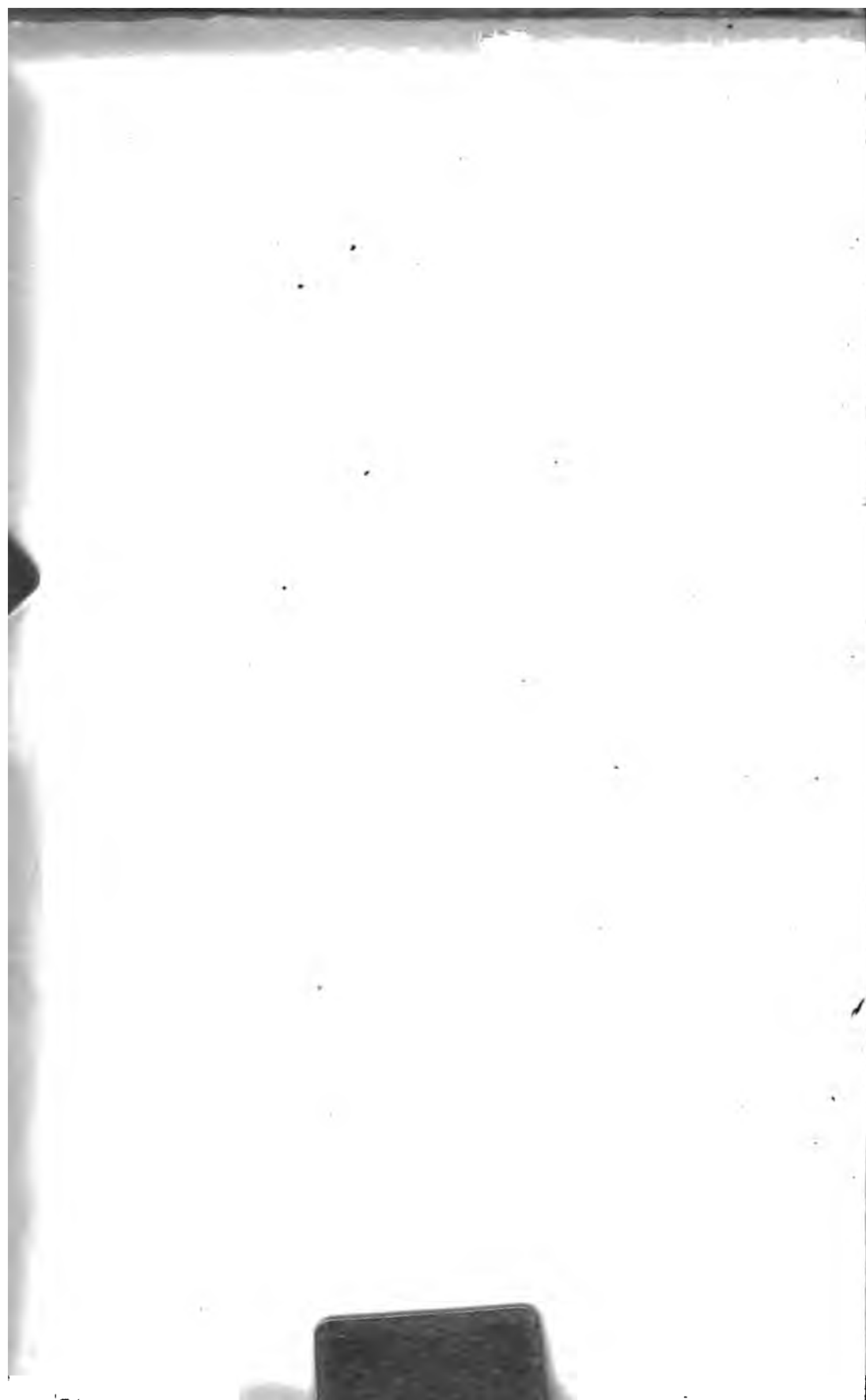
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REPORTS
OF
CASES IN BANKRUPTCY,
ARGUED AND DETERMINED
IN
THE COURT OF REVIEW,
AND ON
APPEAL BEFORE THE LORD CHANCELLOR.

WITH
A DIGEST OF THE CASES
RELATING TO
BANKRUPTCY IN ALL THE CONTEMPORANEOUS REPORTS.

By EDWARD E. DEACON,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. III.

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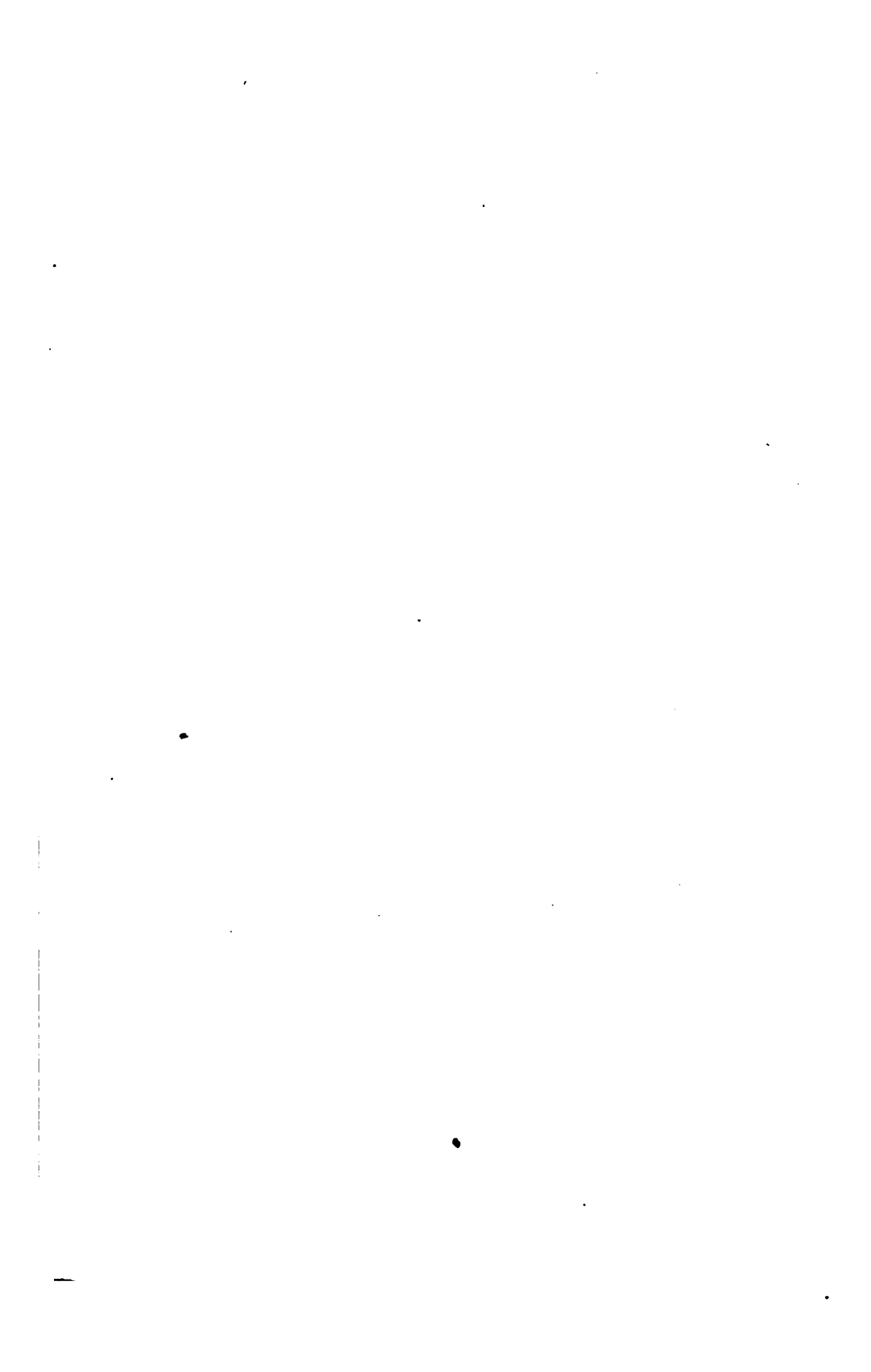
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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

Ex parte JERRARD and another.—In the matter of
ABRAHAM CHAMBERS the elder, and ABRAHAM CHAMBERS the younger.

THIS was a petition by creditors who had proved under the commission to rescind two several Orders of the Lord Chancellor, which had been made in this bankruptcy, under the following circumstances :—

On the 18th November 1835, a meeting of the creditors of the bankrupts had been called by advertisement to agree to a proposal made to Mr. *Chambers* by the assignees, to abandon the issue (a) which he had obtained to try the validity of the commission, and agree not further to contest it, on receiving 23,000*l.* from the estate. At this meeting it was resolved that it would be advisable to accede to the proposal; and the creditors present authorized the assignees to carry the arrangement into effect. Of the creditors present at the meeting the debts of those who had proved amounted to 170,000*l.*, and

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Lincoln's Inn
Hall, August
16, 1837.
Coram Lord
Chancellor.

Semble, that the Lord Chancellor has jurisdiction to sanction an arrangement made by a bankrupt with his assignees, to submit to the commission on payment to him of a certain sum out of his estate, and to order his assignees to pay to him a portion of that sum, in pursuance of such arrangement: the major part of the bankrupt's creditors, both in number and value, having agreed to the arrangement at a meeting duly convened for that purpose.

(a) See *Ex parte Chambers*, 1 Deac. 197.

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Ex parte
JERRARD
and another.

three-fourths in number of those who had claimed debts, also, assented to the proposed compromise. The creditors who had actually proved debts were 400 in number, and their debts amounted to 200,000*l.* A deed of covenant was accordingly entered into by the surviving assignees and the creditors who had assented to the compromise, whereby the assignees engaged to use their utmost endeavours to procure the consent of the creditors of the bankrupts and of others, to the payment of 23,000*l.* to *Chambers* the elder out of his estate; and that upon obtaining such consent, or being otherwise in a situation lawfully so to do, the assignees would do all acts on their part to enable *Chambers* the elder to obtain payment of such sum; which was agreed to be applied, first, to the extent of 13,000*l.*, in the payment of the costs which *Chambers* had incurred in litigating the commission, to be taxed as between solicitor and client, and to be paid to such attornies, and in such order as *Chambers* should direct; and the residue of the 23,000*l.* was to be paid to *Chambers*.

On the 9th July 1836, an application was made, by petition, to the Lord Chancellor to confirm the above arrangement, and his lordship made the order at once, without a previous reference to the Commissioners (*a*).

On the 26th July 1837, a further Order was made on the application of Mr. *Chambers*, whereby the sum of 2000*l.* was directed to be paid to him by the assignees, in part of the 23,000*l.*

The present petition, after stating the above facts, alléged that the petitioners were creditors of the bankrupts for the several sums of 2091*l.* and 368*l.*; that out of 400 creditors, only 241 had signed the deed; that

(*a*) See *Ex parte Earl of Arran*, 2 Mont. & A. 42; 1 Mylne & C. 509.

the petitioners were not parties to, nor had assented to the agreement of compromise; and that when the above Orders were made, the Lord Chancellor was not made acquainted with the extent of litigation then pending with regard to the bankrupt's affairs.

In answer to the allegations contained in the petition, the respondents filed several affidavits, in which they alleged that the petitioners had in fact acquiesced in the proposed arrangement.

Mr. *Anderdon*, in support of the petition. As the petitioners were not parties to either of the former Orders, they have a right to repudiate them. They complain that the Order of the 9th July 1836 was made at once, without the usual intermediate order of reference to a Master, to ascertain whether the arrangement would be beneficial to the estate. And the second Order, it is submitted, is one which cannot regularly be made in bankruptcy. By the 1 & 2 Will. 4. c. 56. s. 22. it is enacted, "that all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the accountant-general of the High Court of Chancery, to be subject to such order, rule, and regulation for the keeping of the account of the said monies and other effects, and for the payment and delivery, investment, and payment and delivery out of the same, as the Lord Chancellor or the said Court of Review, or any judge of the said Court of Bankruptcy, if authorized so to do by any general order of the same Court, shall direct." This clause merely

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and another.

contemplates the Lord Chancellor acting, like any other judge of the Court of Bankruptcy, under a general order of the Court, and solely for the purpose of administering the funds under the bankruptcy. The clause, too, is altered by the 5 & 6 Will. 4. c. 29. s. 4., under which some general orders have been made, giving powers to the judges of the Court of Bankruptcy, but not to the Lord Chancellor. By the first-mentioned Act (s. 2.), all the power and jurisdiction of the Lord Chancellor in matters of bankruptcy is transferred to the Court of Review. [Lord *Cottenham*, C. If the Lord Chancellor orders a fiat to be annulled, cannot he order the funds belonging to the bankrupt's estate to be paid out of the bank?] He could do so *ex necessitate rei*, but the Orders now objected to were not made in contemplation of superseding this commission.

The *Attorney-General*, and Mr. *Dixon*, for the bankrupt. The Lord Chancellor had clearly jurisdiction to make both these Orders. It is a well recognized principle in law, that jurisdiction is never taken away by an act of parliament, except by express enactment; and there is nothing in the Bankruptcy Court Act which deprives the Lord Chancellor of jurisdiction in bankruptcy: that act merely gives a concurrent jurisdiction to the Court of Review. By the 22d section of that statute, the Lord Chancellor has power to make general orders, and he therefore can make a particular order. An issue was ordered by the Lord Chancellor which was compromised; and the Lord Chancellor sanctioned the compromise. It cannot be disputed that the first Order is valid; then, if so, cannot the Lord Chancellor carry his own Order into effect, or must he go as a suitor to the

Court of Review, begging them to enforce his own order? The Order in question grows out of a petition to supersede, a jurisdiction which the Lord Chancellor always possessed; and the 19th section of the Bankruptcy Court Act expressly reserves power to the Lord Chancellor to order any fiat to be annulled, and that such order shall have all the force and effect of a supersedeas. The bankrupt's counsel then read various affidavits, to show that the petitioners had acquiesced in the Order of the 9th July 1836.

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Mr. *Jacob*, and Mr. *G. Richards*, for the assignees. The assignees, having been parties to the Order in question, do not wish it to be disturbed; and they deny the right of the petitioners to object to the Order, merely because they were not parties to it themselves. In all cases, where several *cestui que trusts* are concerned, if a person who is authorized to act on their behalf becomes a party to any arrangement for them, a Court of Equity will hold them all bound, although some may be dissentient; otherwise certain matters could never be arranged. Compromises of this nature continually take place in creditors' suits, and such was always the case in bankruptcy. In *Jarvis v. Brasier*, which occurred a few years ago, but which does not appear to be reported, some of the *cestui que trusts* objected to a compromise; but it was nevertheless enforced by an order of this Court. The suit of *Devaynes v. Noble* (a) has recently been so compromised. If the petitioners however had any objections to the Order, why did they not make them at the hearing? There is nothing in the 1 & 2 Will. 4. c. 56., which deprives the Lord Chancellor of

(a) This case also does not seem to have been reported.

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JERRARD
and another.

jurisdiction in any matter of bankruptcy; and petitions to annul are still heard by the Lord Chancellor, after Lord *Brougham* had decided that he would not hear other petitions (a); which decision must have been intended more for the convenient division of business, than as deciding that the Chancellor had no jurisdiction in bankruptcy. The acts of parliament referred to enable the Lord Chancellor to make orders touching the funds belonging to the bankrupt's estate; and not long since the Chancellor made a particular order in the matter of *Joyner* (b).

Lord COTTENHAM C.—That is rather a general order touching a particular bankruptcy.

Mr. *Anderdon*, in reply. All the authorities plainly show, that all jurisdiction in bankruptcy is transferred to the Court of Review, except on petitions to annul a fiat. With respect to the cases cited which are not reported, the Court cannot know how far they apply; but if it is meant to infer from them that this Court can bind dissentient *cestui que trusts*, that position is perfectly untenable. It is true, that in the present case the petitioners acquiesced to a certain extent, on the understanding that the Order was to put an end to all litigation between the bankrupt and the assignees; but when the petitioners find that is not the case, they have a right to adopt this proceeding.

(a) See *Ex parte Keys*, 3 Deac. & C. 263; 1 Mont. & A. 226; *Ex parte Nokes*, 1 Mont. & A. 461; *Re Walker*, 2 Mont. & A. 267; 1 Deac. 88; *Ex parte Barrington*, 1 Deac. 3; 2 Mont. & A. 255.

(b) This order was made on the 21st June 1836, by which the Commissioner was authorized, when any dividends were for less sums than 1*l.*, to order the official assignee to pay them in cash, instead of by a cheque on the bank, and the accountant in bankruptcy to repay the official assignee.

Lord COTTENHAM, C.—That the arrangement now sought to be set aside was most beneficial for all parties, is as clear to me, as if every Master in Chancery had reported in its favour, looking at the time which had elapsed since the commission issued, the amount of law expenses incurred in disputing its validity, and the fact that no dividend had been yet declared. The arrangement promised to wind up the bankruptcy, and *Chambers* agreed to acquiesce in his commission, on being paid 23,000*l.* and being released from prison. The assignees must have conceived an arrangement beneficial for themselves and the creditors, for which they gave 23,000*l.* It is a known rule, that all the creditors of an insolvent need not actually sign a composition deed; but if they concur, and act under it, the Court will consider it as obligatory as if they had signed. The arrangement in question was submitted to a large body of creditors, who unanimously agreed to it, and when the petitioners were present by their solicitor. Part of the arrangement was, that *Chambers* was to appropriate a portion of the 23,000*l.*, to the amount of 13,000*l.*, towards payment of the bills of costs of the different solicitors who had been concerned for him in litigating his bankruptcy; it was never contemplated, that the whole amount of all their various claims should be paid. *Wilton* alone claimed 1600*l.*, but it was left quite to the discretion of *Chambers*, whether he would pay all or any part of *Wilton*'s claim. *Duncan*'s letter (a) of the 5th December is a qualified assent to the arrangement; at that time the reason alleged for the petitioners not signing the deed was, because the separate creditors were not parties. His words are: "I assent to the arrangement, but can-

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Ex parte,
JERRARD
and another.

(a) *Duncan* was then employed by the petitioners as their solicitor.

1837.

Ex parte
JERRARD
and another.

not sign, as only the joint creditors are parties." But on the 18th October 1836, after *Duncan* had seen the Order of which he now complains, he wrote a letter referring to that Order; at which time it is not suggested, that he contemplated any resistance to it. He speaks of the arrangement as confirmed, and naturally asks as to *Wilton's* claims; but that leaves untouched the Order itself. He assents to the deed and comes into the arrangement, which fixes the petitioners with assent to the subsequent Order; for that only confirms the arrangement. Then, because the whole 23,000*l.* cannot be immediately raised, *Chambers* is to have 2000*l.* paid in part of that sum. This does not alter any rights, nor create any fresh liabilities; therefore no question arises as to the interests of absent parties. A distinction has been attempted to be drawn between ordering the assignees to pay, which it is urged exposes them to liability, and ordering the money to be paid out of Court. There is no such distinction; parties doing what the Court directs are always protected. It is not necessary to consider the question of jurisdiction. If there were any doubt, the petitioners are estopped from objecting to it. I can only treat this as the petition of the creditors who have presented it; though enough appears in the affidavits to show that they are not the real parties interested, nor those for whose benefit the petition is preferred; but with that I have nothing to do, and can only order this petition to be dismissed.

Petition dismissed, with costs.



1837.

Ex parte M'INTOSH.—In the matter of *M'INTOSH.*

THIS was a petition of the bankrupt to annul the fiat, on the ground of an insufficient petitioning creditor's debt, and a verdict having been obtained by him in an action at law against his assignees, in which that fact was put in issue.

A former petition to annul the fiat had been presented by the bankrupt, upon the hearing of which the Court thought the debt was established, but left the bankrupt to bring his action at law (*a*). The bankrupt accordingly brought an action against the assignees and the auctioneer who had sold his effects, which came on for trial in August last, when the bankrupt recovered a verdict in his favour, the defendants failing to prove a good petitioning creditor's debt. There was no dispute about the trading, or the act of bankruptcy, and the petitioner did not now produce any evidence showing the invalidity of the petitioning creditor's debt, but relied on the verdict.

Westminster,
November 6.
Although the bankrupt obtains a verdict in an action against his assignees disputing his bankruptcy, yet if the petitioning creditor is not a party to the action, it is not of course to annul the fiat.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition. It is a matter of course to annul a fiat, after the bankrupt has obtained a verdict in an action at law disputing its validity. In the present case, there has been no application to the Court of Law for a new trial; but, on the contrary, a motion has been made by the defendants to reduce the damages, thus acknowledging the bankrupt's right to sustain the verdict. [Sir *G. Rose*. Was the petitioning creditor a party to the action?] The petitioning creditor was not a party to the record; but it appears plain, that he assisted in defending the

(*a*) See *Ex parte M'Intosh*, 2 Deac. 35.

1837.
Ex parte
M'INTOSH.

action; for he has made an affidavit in answer to the present petition, stating that he proved the existence of his debt on the trial. The usual course to try the validity of a fiat is, by bringing an action at law against the assignee; and though the petitioning creditor is admitted by this Court to come in and support the fiat, yet the action at law is brought against the assignee. In this case, too, the same solicitor, who was employed by the petitioning creditor in issuing the fiat, was employed by the assignees in defending the action. And the petitioning creditor has made no affidavit denying that he employed the solicitor to defend the action.

Mr. *Coleridge*, for the petitioning creditor, stated that the latter had made an affidavit, in which he swore that the bankrupt had on a former occasion admitted the debt, and promised to pay it.

Mr. *Anderdon* appeared for the assignees.

The Court thought, that as the petitioning creditor was not a party to the record in the action at law, the verdict was not conclusive against him; and that as there was now no evidence before the Court, except the verdict, to prove the want of a good petitioning creditor's debt, the Court ought not to annul the fiat, as against him, with costs. The Court then offered an issue to the petitioning creditor, but intimated that the verdict would probably be against him.

Mr. *Swanston* said, that he would not press for costs against the petitioning creditor; upon which

Mr. *Coleridge*, and Mr. *Anderdon*, on behalf of their respective clients, consented that the fiat should be annulled. They suggested, however, as a difficulty, that the certificate of the appointment of the assignees had already been inrolled; but

1837.

Ex parte
M'INTOSH.

The COURT said, the certificate fell with the fiat.

ORDERED, that the fiat should be annulled, by consent, without costs; the bankrupt undertaking not to bring any action against the petitioning creditor.

Ex parte FOULKES.—In the matter of FOULKES.

THIS was the petition of the bankrupt to annul the fiat, with the consent of all the creditors, who had proved at the first meeting. It appeared, that it was then notified to the Commissioner that the creditors had consented to annul the fiat, and that the bankrupt had surrendered. The Commissioner, however, appointed another meeting for proof of debts and choice of assignees; but as no creditors attended, no assignees were chosen, and the meeting was adjourned. Upon applying at the bankrupt office for the usual order to annul, the Registrar declined to draw it up, as the second meeting appointed by the Commissioner was before the 42d day, and which in fact had not yet arrived.

Westminster,
November 6.
A fiat may be annulled with consent of all the creditors before the 42d day, if two meetings have been held for proof of debts.

Mr. *Bacon* appeared in support of the petition.

1837.

Ex parte
FOULKES.

The COURT said, that as there had been already two meetings for the proof of debts, this was a sufficient compliance with the practice of the Court, and therefore ordered the fiat to be annulled (a).

(a) See *Ex parte Boardman*, 4 Deac. & C. 724.

Ex parte COTTERELL, HILL & Co.—In the matter of
DOUGLAS and ANDERSON.

Westminster,
November 11.

A., a merchant abroad, writes to B., his agent in England, a letter inclosing bills, in which he says: "the above bills are belonging to, and on account of, C., and I will thank you to dispose of the same to him." Before the bills arrive, B. becomes bankrupt, and the bills come to the possession of the assignees. *Held*, that the directions in A.'s letter amounted to an appropriation of the bills, and that C. was entitled to claim them from the assignees.

THIS was a petition for an Order on the assignees to pay over to the petitioners the amount of the proceeds of certain bills of exchange, which the petitioners contended had been appropriated for the payment of their debts.

The bankrupts were the London agents of *Douglas Mackenzie & Co.* of Singapore; and were also the agents of the petitioners, who were merchants at Walsall in Staffordshire, and who from time to time made consignments of merchandize, through the bankrupts, to *Douglas Mackenzie & Co.* for sale. On the 31st December 1836, *Douglas Mackenzie & Co.* wrote to the petitioners the following letter, which was inclosed in one of the same date addressed to the bankrupts.

"Singapore, 31st December 1836.

"Messrs. *Cotterell, Hill & Co.*

"Gentlemen,

"We confirm our last reports of 29th ult. per *Samuel Winter*, and beg to inform you, we have this day remitted you, through Messrs. *Douglas Anderson & Co.*, London, in full of account sales rendered, dollars 3149. 25. by bills at six months sight; 4s. 8d. exchange is 734l. 16s. 6d. sterling, which we trust you will find correct. You will observe, that part of the sales are not yet due; but we have in this in-

stance been enabled to purchase bills on England at a credit of two months, and were desirous of seeing your account closed, as our establishment here ceases after this date.

We remain, &c.

For *John Douglas Mackenzie & Co.*

F. Lorrain."

1837.

Ex parte
COTTERELL
and others.

The letter to the bankrupts, inclosing the above, was as follows :

"Singapore, 31st December 1836.

"Messrs. *Douglas Anderson & Co.*

"Gentlemen,

"We beg to inclose you the following bills. [The letter then specified the bills amounting together to 5284*l.*] The above bills are belonging to, and for account of, the following parties; and we will thank you to dispose of the same as follows:—to the Belgian Company the three first, amounting to 720*l.* = 3147 dollars," ————— "the remainder to be disposed of as follows:—to *Cotterell, Hill, & Co.* [the petitioners] 734*l.* = 3149 dollars. We inclose eleven letters for the above parties, which after perusal we will thank you to forward.

We remain, &c.

Douglas Mackenzie & Co.

Long before these letters reached England, *Douglas & Anderson* had become bankrupts, a fiat having been issued against them on the 8th December 1836, and the letters with the bills inclosed came to the hands of their assignees, who on the 15th July 1837 transmitted the letter addressed by *Douglas Mackenzie & Co.* to the petitioners. The bills for 734*l.*, so directed to be sent to the petitioners, were indorsed by *Douglas Mackenzie & Co.*, and the assignees applied the proceeds as part of the estate of the bankrupts.

The defence made by the assignees to the claim of the petitioners was, that the remittances made by *Douglas Mackenzie & Co.* were 600*l.* less than the payments and appropriations directed by their letter, even if the

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whole of the bills had been good ; but that bills to the amount of 400*l.* were drawn on the bankrupts and dishonoured, and bills amounting to 783*l.* were drawn on persons who refused to accept them. The bills, however, which were directed to be sent to the petitioners, were good bills, and the whole amount had been received by the assignees. The assignees also relied on the following facts.

It appeared, that on the 7th March 1836 Messrs. *Douglas Mackenzie & Co.* had remitted to the petitioners, through their agents the bankrupts, a bill for 1000*l.* sterling, at six months, on account of what was due from *Douglas Mackenzie & Co.* to the petitioners for sales made on their account. The bankrupts by a letter dated the 6th August 1836, advised the petitioners of this remittance, but claimed a balance of 409*l.* to be due to the bankrupts from the petitioners, and stated that they could not then credit the petitioners for the 1000*l.*, but were agreeable to be considered as debtors to them for the difference between these sums, and to hold the same at their disposal.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. The assignees of *Douglas & Anderson* can have no pretence for claiming the proceeds of these bills—they belong either to the petitioners, or to *Douglas Mackenzie & Co.* The same order should be made in this case, as was made in *Ex parte Clegg* (a). On that occasion the case of *Williams v. Everett* (b) was cited, as an authority against the claim of the petitioners. We

(a) This case was heard before the Chief Judge and Sir *J. Cross* on the 26th July 1837, and is not yet reported.

(b) 14 East, 582.

do not dispute the authority of that case; but it has no application to this. In that case, the remitter of the bills directed his agent to pay certain sums to the plaintiff out of the produce of the bills when received—here the remitters, by their letter of the 31st December, expressly declare that the bills themselves “are belonging to, and for account of,” the parties specified in the letter. In that case, also, the defendants refused from the beginning to act upon the letter of advice, and it was held, that there was consequently no privity of contract between the plaintiff and the defendants. But the assignees here can have no right to apply the proceeds of these bills to the payment of any balance due to the bankrupts from *Douglas Mackenzie & Co.* The bills were remitted to the bankrupts, upon a special trust to hand them over to the several persons named in the letter; and if the assignees refused to fulfill the trust, they had no right to deal with them as the property of the bankrupts. It was decided in *Buchanan v. Findlay (a)*, that where a bill is remitted to a party for a particular purpose, he is bound to perform that purpose, or return the bill; and if he receives the amount, contrary to the directions of the remitter, he cannot apply the proceeds towards the payment of his own debt. The bills for 734*l.*, remitted by the letter of the 31st December 1836, are not to be mixed up with the previous transaction as to the 1000*l.* bill—the two transactions are perfectly distinct. The cases of *Kilsby v. Williams (b)*, and *Burn v. Carvalho (c)* were also cited on behalf of the petitioners.

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Mr. *J. Russell*, and Mr. *Bethell*, for the assignees.

(a) 9 B. & C. 738.

(b) 5 B. & Adol. 815.

(c) 7 Sim. 109.

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The present case differs from that of *Ex parte Clegg* (a); for there the bankrupts were held to be the agents of the Belgian Company, and not the agents of *Douglas Mackenzie & Co.* But an order to apply certain proceeds to the use of another does not vest the property in the party; for it may be at any time revoked by the party who gave the order. In *Scott v. Porcher* (b) it was held, that a mere direction from a principal to his agent, to pay over certain proceeds (when obtained) to a third person, his creditor, gives no right or interest to the creditor, although the agent consents to fulfil the directions of his principal. [*Erskine*, C. J. In *Scott v. Porcher* the judgment of the Court proceeded upon a revocation of the remittance, and no communication having been made by the remitter to the party for whose benefit the remittance had been made.] The directions given in the present case were equally capable of revocation by *Douglas Mackenzie & Co.* The petitioners could have no lien on the proceeds of these bills. In *Ex parte Heywood* (c) it was held, that where *A.* consigned a cargo to *B.*, with a direction to pay to *C.* out of the proceeds a sum of money, and even wrote to *C.* to inform him of the order in his favour, *C.* had notwithstanding no lien on the proceeds. [*Erskine* C. J. The question in this case is, whether the letter of *Douglas Mackenzie & Co.* did not of itself amount to an appropriation of these bills to the payment of the 734*l.* to the petitioners. The expression in their letter is very strong, where they say, that "the above bills are belonging to, and for account of, the following parties."] There is another material question for the consideration of the Court, and that is, whether this is a subject for jurisdic-

(a) See note ante.

(b) 3 Meriv. 652.

(c) 2 Rose, 355.

tion in bankruptcy; as *Douglas Mackenzie & Co.*, who are materially interested in the result of this litigation, are no parties to the petition. [Sir J. Cross. You are now setting up the *jus tertii*, to excuse you from doing what that third person has desired you to do.] The bills here are specially indorsed by *Douglas Mackenzie & Co.* to *Douglas & Anderson*; and the directions are, not to apply any particular bills towards the payment of the 734*l.*, but some bills to that amount. With respect to the remittance of the 1000*l.* bill contained in the letter of the 7th March 1836, the bankrupts told the petitioners that they could not comply with the directions of *Douglas Mackenzie & Co.* in regard to that bill, but proposed some other arrangement; and the petitioners had no more reason to conclude, that the bankrupts would assent to the directions as to the payment of the 734*l.* The assignees here say, that the money which has come to their hands from the proceeds of these bills is liable to the claim of the bankrupts against *Douglas Mackenzie & Co.* The letter from the latter firm amounts to nothing more than a remittance of bills from a party who was indebted to another, requesting him to apply the bills for the benefit of certain persons, if he should approve of their being so applied. The bankrupts were, when they received this letter, large creditors of *Douglas Mackenzie & Co.* Suppose they had refused to comply with the request contained in the letter, and had applied the proceeds of the bills to the payment of their own debt,—could the other parties have an action against *Douglas & Anderson* for this application of the bills? We submit they could not. There is no case where a Court of Equity will raise a trust, in which a Court of Law will not raise a contract; the

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law as to appropriation is the same both in Law and Equity. This is clearly deducible from Sir *W. Grant's* judgment in *Scott v. Porcher* (a) where he says, in alluding to the directions for the payment of the money relied upon in that case, "this amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit; it may be revoked, too, by any disposition of the property inconsistent with the execution of it." Then, with respect to any argument that may be raised on the transmission by the assignees to the petitioners of the letter addressed to them by *Douglas Mackenzie & Co.*,—even viewing this communication in the light of a notice to them from the assignees that they had received a sum of money with directions to apply it for the benefit of the petitioners,—we contend, that such a notice would not raise a contract with the petitioners on the part of the assignees to comply with such directions. And the letter addressed by *Douglas Mackenzie & Co.* to the bankrupts amounts to nothing like a special trust; it is nothing more than a general request made by a debtor to his creditor to pay another creditor a sum of money, which the party to whom the request is made may do, or not, as he thinks proper. The case of *Burn v. Carvalho* (b), which was relied on by the other side, does not strengthen the case of the petitioners. It certainly would appear strange, from merely reading the marginal note of that case, that the merchant in London should have been entitled to any lien; but if you look at the facts of the

(a) 3 Meriv. 652.

(b) 7 Sim. 109.

case, it will be found, that there was a direct correspondence between the London and Liverpool merchants, whereby it was expressly agreed that the agent of one party should deliver the goods in question to the agent of the other.

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Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The claim of the petitioners in this case depends upon the two letters of the 31st December 1836 respectively addressed by *Douglas Mackenzie & Co.* to the petitioners and the bankrupts; by which they inform the petitioners that they have remitted them bills, through the bankrupts, for the sum of 734*l.*; and they apprise the bankrupts, that bills to that amount are for the account of the petitioners. These letters were written after the bankruptcy of *Douglas & Anderson*, but before news of it was received at Singapore. The assignees have received the bills, and have applied the proceeds for the benefit of the estate of the bankrupts; and the question is, whether the assignees were entitled so to deal with them, or whether the bills were so appropriated by *Douglas Mackenzie & Co.*, as to belong to the petitioners. The question is not governed by any of the cases cited in the argument; as in all of them, either goods were consigned to be sold, or bills were to be realized; and the consignee was then to pay certain debts, or hand over the proceeds to certain persons specified; and the remittances were general, though accompanied by directions to make certain payments. In some of the cases, the party claiming the proceeds had notice of the directions given by the consignor; in others, he had no notice. The main question for our considera-

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tion is, whether the order of *Douglas Mackenzie & Co.* was in its nature revocable; and if so, whether it was in fact revoked. It appears to me, that such order was not revocable; and if it were, that it was never attempted to be revoked. The bills were sent, as the property of the petitioners and other persons specifically named; three, amounting to 720*l.*, are directed to be delivered to the Belgian Company—other bills are remitted generally on account of the claims of a particular class of creditors,—and the remainder of the bills are specifically appropriated to the petitioners; which latter circumstance distinguishes the present case from all the reported decisions. The assignees then contend, that the claim of the petitioners is rebutted by the transaction in March 1836; but that transaction is perfectly distinct from that on which the present claim is founded, and can give the assignees no right of set off in the present case. The claim of the petitioners is against the assignees for money had and received by them since the bankruptcy to the use of the petitioners, not for a debt due to the petitioners from the bankrupts; consequently, the assignees cannot set off a debt due to the bankrupts against a claim to which they are personally liable. It appears, from the transaction between the petitioners and the bankrupts in March 1836, that the bankrupts claimed a sum of 409*l.* to be due to them from the petitioners; and that when the bankrupts received directions from *Douglas Mackenzie & Co.* to pay 1000*l.* to the petitioners, the bankrupts refused so to do, but made an arrangement with the petitioners enabling them to stand on their books as creditors for 590*l.*, leaving open the question, whether or not 409*l.* was still due from the petitioners to the estate of the bankrupts. It is not clear, however, what result followed from the transac-

tion in March 1836; and my colleagues do not entertain so strong an opinion as I do on this part of the case. I concur, however, in opinion with them, that the petitioners in this case are entitled to the same order as was made in *Ex parte Clegg*. I should have restrained the payment of the 734*l.*, until it was ascertained whether or not any debt was due to the bankrupts from *Douglas Mackenzie & Co.*; but in that the rest of the Court do not concur. Any question between the petitioners and *Douglas Mackenzie & Co.* is still open, as the latter are not now before the Court; but the assignees of *Douglas & Anderson* have no defence against *Cotterell & Co.* on this petition.

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Sir JOHN CROSS.—The real question is, whether these assignees are to retain in their hands a sum of 5284*l.*, which they have got possession of since the bankruptcy, and which was remitted to the bankrupts with express directions to pay it over to different persons. Is this sum to be considered as part of the bankrupts' estate? Clearly not. The assignees, however, contend that *Douglas Mackenzie & Co.* may revoke their authority; but with that they have nothing to do, as the authority is not revoked. This money forms no part of the bankrupts' estate, and the Court has jurisdiction to order it to be refunded by the assignees to the rightful owner. It has been argued, that if there is no legal contract between the parties now before the Court, the petitioners cannot recover in this Court; a doctrine, which, if correct, would be followed by this consequence, that if a trustee withholds any portion of a trust fund from those who are entitled to it, equity would not interfere, unless an action of assumpsit would lie against him for money had

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and received. Then the assignees claim to set off a debt of 409*l.* due from the petitioners to the bankrupts; but if this sum is really due from the petitioners, the assignees cannot set it off against a debt accruing from themselves. And it appears to me, that the transaction in March 1836 between the petitioners and the bankrupts is wholly foreign to this matter; for it was a closed account, and the 409*l.* was written off. The petitioners are therefore in my opinion fully entitled to the relief they ask.

Sir GEORGE ROSE.—I was not present in Court when *Ex parte Clegg* was decided; but I read the petition, and thought the Court never exercised jurisdiction in a clearer case; and I entirely concur in that decision. If I had seen affidavits to the effect of those in this petition, I should have proposed a general Order on behalf of all persons similarly circumstanced with the petitioners in that case, leaving open in its terms any opposition to the amount of the respective claims. In the present case it is clear, that the bills having been indorsed by *Douglas Mackenzie & Co.*, the latter were divested of all legal title to the bills, which by virtue of such indorsement became vested in the assignees of *Douglas & Anderson*; but the petitioners show a clear case for the interference of the Court against that legal title. It has long been settled, that the Court can so interfere. It never was held, that the bankruptcy of an agent so determines his agency, as to enable his assignees to receive bills remitted by the principal for a special purpose, and yet not apply the proceeds pursuant to the directions of the principal. But even if bankruptcy were a determination of the agency, yet the state of circumstances in this

case would, independently of any appropriation, entitle the petitioners to the proceeds of the bills to the amount of 734*l*. The bankrupts were as much agents for the petitioners, the shippers in England, as for *Douglas Mackenzie & Co.* at Singapore. But, if merely the agents for *Douglas Mackenzie & Co.*, still this Court would not allow the assignees of an agent to apply the proceeds of the principal in payment of the agent's debts. The letter of the 31st December 1836 is an intimation to the bankrupts, that the bills inclosed in it belonged to the bankrupts and other persons; and the question is, whether this is not an absolute appropriation of the bills. The bills are indorsed by *Douglas Mackenzie & Co.*, so that the legal title is gone from them; and they have no equity against the legal title, for they admit they are debtors to the petitioners; and after giving them notice of the remittance, they cannot revoke the transaction. The petitioners would have a clear right to prove against the estate of the bankrupts for the 734*l*., unless the proceeds of the bills are to go in satisfaction of their debt; so that the question before the Court is one connected with the right of proof. The Order of the Court will by no means interfere with the right of *Douglas Mackenzie & Co.*, if they think fit to contest the Order; it is founded on the fact, that the letter of the 31st December 1836 is a distinct appropriation of the bills in favour of the petitioners. And the Order will be without prejudice to any question as to the 409*l*. claimed by the assignees to be due from the petitioners to *Douglas & Anderson*.

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The ORDER was, that the assignees, out of the specific fund in the petition mentioned, should pay

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to the petitioners the sum of 734*l.* 16*s.* 6*d.*, less so much of the sum of 591*l.* 9*s.* 4*d.* mentioned in the letter of the 31st December 1836, as the said sum of 734*l.* 16*s.* 6*d.* bore in proportion thereto with the sums therein directed to be paid to the other persons named therein, according to the respective demands set opposite to their respective names;—and that the petitioners should have their costs out of their own proportion of the fund, and the assignees retain their costs out of the general estate.

Westminster,
Nov. 11 & 21,
1837.

Ex parte FIELD.—In the matter of FIELD.

On a petition to annul, or reverse the adjudication, the Court will look at the depositions on the proceedings, to see whether they are sufficient to support the fiat. If insufficient, and the petitioning creditor, or assignees offer no further evidence, the fiat is annulled, as of course. But if sufficient, the Court will give the bankrupt an opportunity to controvert the statements contained in the depositions.

THIS was a petition by the bankrupt to reverse the adjudication, under the provisions of the 17th section of the 1 & 2 *Will.* 4. c. 56. on the ground that there was no valid petitioning creditor's debt, and that he had committed no act of bankruptcy. The petitioner, however, being too late in his application under that section, the Court permitted the petition to be treated as a common petition to annul the fiat.

Mr. *Swanston*, for the petition.

Mr. *Anderdon*, for the petitioning creditor, tendered the deposition on the proceedings as evidence of the act of bankruptcy.

Mr. *Swanston* objected, that this deposition was no evidence against the bankrupt.

Sir GEORGE ROSE.—The Court has a right to look at the proceedings; and that is the usual course. If there does not appear on the face of them to have been a sufficient act of bankruptcy, and the petitioning creditor produces no further evidence on that head, the fiat will be annulled at once. But if there is an act of bankruptcy on the proceedings, the Court then requires some further investigation, and gives the bankrupt an opportunity to controvert the facts stated in the depositions.

1837.

Ex parte
FIELD.

The COURT finally ordered a *vivâ voce* examination, and the result was, that the petition was dismissed.

Ex parte LAYMAN HARRISON and HONOR PITT, his Wife.—In the matter of THOMAS DORNFORD.

THIS was a petition of the residuary devisees of a *cestui que trust* to be paid the dividends on their proof for the amount of the trust fund, which had been made, under an Order of the Court, against the estate of the bankrupt, the defaulting trustee.

The petition stated, that in the year 1805, previously to the marriage between *James Curtis* and *Hannah* his wife (then *Hannah Bridge*, spinster,) both since deceased, it was agreed that the sum of 1500*l.*, 3*l.* per cent. reduced bank annuities, the property of the said *Hannah Bridge*, should be invested in the names of one *Richard Stevens Taylor*, since deceased, and *Thomas Dornford*, the bankrupt, upon certain trusts to be declared by an indenture of settlement. That in pursuance of this agreement, a certain indenture of settlement,

Westminster,
Nov. 13, 1837.

A marriage settlement having been lost, which declared the trusts of a fund belonging to the wife, and there being every probability that the petitioners were entitled to the fund under the provisions of the settlement, they were, after being admitted to prove for the amount, allowed to receive the dividends, without a reference; as the fund was too small to bear that expense.

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Ex parte
HARRISON
and another.

bearing date some time in the year 1805, was duly made and executed for the purpose of settling and assuring this sum, and for declaring the trusts thereof; which trusts, it was alleged, were thereby declared subject to the life interest of *James Curtis* and his wife, to and in favour of the children or issue of the marriage; and in default of such issue, in trust either for the survivor of *James Curtis* and his wife, or else to the said *Hannah Bridge*, or in some other such manner as to vest the same (in default of issue of the marriage) absolutely in *Hannah Curtis*; but the petitioners, not having the indenture, or any copy thereof in their possession, were unable to set forth the particular trusts and limitations contained therein. The sum of 1500*l.* 3*l.* per cent. reduced annuities was accordingly, sometime in the year 1805, transferred into the names of *Richard Stevens Taylor* and the bankrupt, in the books of the governor and company of the Bank of England. Sometime afterwards *Taylor* and the bankrupt, at the instance of *James Curtis*, but in breach of their trust, sold out this sum, and lent and advanced the proceeds thereof to *James Curtis*, upon the security of his bond and warrant of attorney, and a policy of assurance on his life.

Taylor died in the year 1822, leaving the bankrupt his co-trustee, surviving him.

James Curtis died in the year 1824, leaving *Hannah Curtis*, his wife, surviving him, without any issue of the marriage; whereby she became beneficially interested in and entitled to the said sum of 1500*l.* 3*l.* per cent. reduced annuities. *James Curtis* also by his will, dated the 26th July 1812, after appointing *Taylor* and the bankrupt his executors, confirmed the settlement therein expressed to be made previous to his marriage, and thereby

gave and devised unto *Taylor* and the bankrupt, and their heirs, certain real estate, and all his personal estate, with directions to sell and convert them into money, and to apply the proceeds to discharge certain mortgages; and from and after full payment and satisfaction of such mortgages, upon trust to replace, re-transfer, and re-invest the said sum of 1500*l.* 3*l.* per cent. reduced bank annuities (which he acknowledged to have some time since borrowed of the trustees of his marriage settlement,) upon the trusts of the said settlement, in discharge of his bond, and warrant of attorney to secure the same. By a codicil to his will, bearing date the 22d June 1819, *James Curtis* revoked the appointment of the bankrupt as his executor, and appointed *Thomas Mortimer* an executor in his stead.

Thomas Mortimer died shortly after *James Curtis*, without having proved his will: upon which administration of the goods and chattels of *James Curtis*, with the will and codicil annexed, were, on the 17th December 1824, granted to *Ann Pitt Martin*, the wife of *A. Martin*, and the petitioner, *Honor Pitt Harrison*, who thereby became the legal personal representatives of *J. Curtis*.

Shortly after the death of *James Curtis*, these administratrixes sold the real estate in his will mentioned, and out of the proceeds thereof, or out of other monies possessed or received by them as such administratrixes, purchased the sum of 1500*l.* 3*l.* per cent. bank annuities; which sum was accordingly, on the 12th July 1825, transferred into the name of the bankrupt in the books of the Bank of England, as such surviving trustee, upon the trusts of the said indenture of settlement.

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Afer this purchase and investment, *Dornford* wrongfully, and in breach of his trust, sold out the stock, and received and applied the proceeds to his own use.

On the 1st February 1826, a commission of bankrupt was issued against *Thomas Dornford*, under which he was duly found and declared a bankrupt.

Hannah Curtis, having thus become beneficially interested in and entitled to the said sum of 1500*l.* 3*l.* per cent. reduced annuities, by her will, dated the 2nd August 1832, after making a certain specific disposition and appointment therein contained, gave and bequeathed all other her estate, property, and effects of every description to the petitioner, *Honor Pitt Harrison*, for her own absolute use and benefit, and appointed her the sole executrix of her will.

Hannah Curtis died in April 1833, and the petitioner *Honor Pitt Harrison*, as such executrix, on the 12th April, 1833, obtained probate of her will.

The petitioners stated, that they had caused frequent application to be made to the bankrupt for an inspection of the indenture of settlement, who alleged that the same was not in his possession, and that he did not know what had become of it, but that it was originally left in the possession of *Taylor*, the other trustee. The petitioners, however, had ascertained that in the year 1825, which was after *Taylor's* death, the indenture was then in the possession, or under the control of the bankrupt. The petitioners also, having ascertained that the indenture was prepared in *Taylor's* office, had applied to his son, who carried on his father's business as a soli-

citor, for information on the subject; but, notwithstanding a very careful search had been made, neither the indenture itself, nor any draft or copy of, or extract from the same, could be found. The petitioners also alleged, that they had made similar applications to various other parties, but wholly without effect.

The petitioners submitted to the Court, that it was a reasonable and just conclusion, free from doubt or question, that the indenture of settlement, as to the 1500*l.* 3*l.* per cent. reduced annuities, was actually executed, and that the trusts of such settlement were such, as that *James Curtis* took a beneficial interest in that sum; and that upon his death, without issue of the marriage, the beneficial interest in the same was either by way of limitation in the event of survivorship, or by absolute limitation to her, or else by resulting trust, as having been originally her property, vested beneficially and absolutely in *Hannah Curtis*, and passed, by her will, to the petitioners.

By an Order made in this matter, on the 25th July last, it was ordered that the petitioner, *Layman Harrison*, might tender a proof against the estate of the bankrupt, in respect of the said sum of 1500*l.* 3*l.* per cent. reduced bank annuities; but that the payment of any dividend should be postponed until further order, with liberty for the parties interested in the dividends to apply to the Court as they should be advised. In pursuance of this order, the petitioner, *Layman Harrison*, had accordingly made proof for the sum of 1355*l.* 6*s.* 3*d.*; and a dividend of 3*s.* 8*d.* in the pound having been declared under the said commission, the sum of 248*l.* 9*s.* 7*d.*, being the amount of the dividends in respect of

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the said sum of 1355*l.* 6*s.* 3*d.*, had been retained in the Bank of England, subject to the order of the Court.

The petition prayed that this sum of 248*l.* 9*s.* 7*d.*, and all future dividends, might be paid to the petitioners.

Mr. *Anderdon* appeared in support of the petition.

Mr. *Deacon*, on behalf of the assignees, submitted to any order of the Court.

The Bankrupt appeared in person to oppose the petition.

ERSKINE, C. J.—There is every probability, that *Hannah Curtis* became absolutely entitled to the sum of 1500*l.* 3*l.* per cent. reduced annuities. There ought, perhaps, to be a reference to the Registrar, to ascertain whether any other persons besides the petitioners are interested in the fund; but as the fund is too small to bear that expense, the petitioners may take an order for payment to them of the dividends, without prejudice to the rights of any other person.

The other Judges concurring, it was

Ordered accordingly.



Ex parte ISAAC PARKES.—In the matter of ISAAC
PARKES.

1837.

Westminster,
Nov. 14, 1837.

THIS was the petition of the bankrupt to annul the fiat at the costs of the petitioning creditor, on the ground that it had been issued for an illegitimate purpose.

It appeared, from the statement of the bankrupt, that in January 1837 he had entered into a treaty with *William Ball* and *Joseph Walker* to embark with them as copartners in the business of steel-pen makers, and that he was to bring into the concern the value of 200*l.*—for 90*l.* of which he was to be credited, in respect of a large stock of tools which he agreed to bring into the business,—and in respect of the remaining 110*l.* he was to be allowed for the time, labour, and skill that he should devote to the benefit of the projected partnership, until it should actually commence; and if after making such allowance, the 110*l.* should not be satisfied, *Ball* agreed to lend the petitioner a sum sufficient to make up the deficiency. In pursuance of this agreement, premises in the neighbourhood of Birmingham were purchased for the purposes of the manufactory for the sum of 2000*l.*, which sum was afterwards raised by a mortgage on the premises. At the time of entering into this treaty for a partnership with *Ball & Walker*, the petitioner was in the employ of a Mr. *Mitchell* at Birmingham, under articles to him, in the same line of business; which engagement was known to *Ball & Walker*; but, for seven months after his agreement with them, he devoted all the time he was not actually engaged in the service of Mr. *Mitchell* to the benefit of the partnership. In July 1837, *Ball & Walker* called on the petitioner to advance the sum of 200*l.*, denying

To induce the Court to annul a fiat, on the bankrupt's suggestion that the object of the petitioning creditor in issuing it was to dissolve a partnership subsisting between the bankrupt and other persons, the Court must be quite satisfied that that was the sole object of the petitioning creditor.

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that they had agreed to make him any allowance for his stock of tools and for his labour and skill employed in establishing the manufactory. This sum not being paid by the petitioner, *Ball & Walker* formed the design of excluding the petitioner from the benefit of the partnership, and gave directions to the workmen not to admit the petitioner into the premises. They shortly afterwards filed a bill in Chancery against the petitioner, for the purpose of having the partnership dissolved, and obtained an interlocutory injunction to restrain him from interfering in the concerns of the partnership. They also instigated the mortgagees of the property to issue a writ of *capias* against the petitioner for non-payment of the mortgage-money, on which a warrant was taken out against the petitioner only. On the 12th August 1837 a fiat in bankruptcy was issued against the petitioner by one of the executors of the mortgagee, which, the petitioner alleged, was sued out at the instigation of *Ball & Walker*, for the purpose of procuring a dissolution of the partnership, and not for the *bonâ fide* purpose of making a division of his property amongst his creditors. The petitioner stated, that he was not aware that any money was due from the partnership, which the partnership funds were not equal to discharge; and that he believed the mortgaged property was also fully equal to pay the money due on the mortgage; and that he himself owed no private debts. That the solicitor to the fiat was the solicitor of *Ball & Walker*, and the same who filed the bill in Chancery and issued the writ of *capias* against the petitioner; and that the petitioner verily believed that the whole of the proceedings adopted against him were merely instituted, for the purpose of getting rid of him as a partner. The solicitor to the fiat, and

the petitioning creditor, had made affidavits denying the allegations in the petition.

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Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. It is in evidence, that *Ball & Walker* had formed a design to deprive the bankrupt of all benefit of the partnership, and were very active in the prosecution of this design by the proceedings, which they not only adopted themselves against the bankrupt, but which they also instigated the mortgagees to adopt against him. In *Ex parte Christie*(a), this Court directed a commission to be superseded, which had been issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership; and that decision was confirmed on appeal by Lord Chancellor *Brougham*. It is true, that in that case there had been the verdict of a jury, finding that the dissolution of the partnership was the sole object of the petitioning creditor in suing out the commission. But although we have not here the verdict of a jury, yet the members of this Court are judges of fact, as well as law, and are quite competent to decide upon the facts of this case. The facts are not denied. And as to the law,—it is quite sufficient if the improper motive for issuing a fiat is predominant in the mind of the petitioning creditor; it need not be an exclusive motive.

Mr. *Bethell*, and Mr. *Bird*, who appeared for the petitioning creditor and the partners of the bankrupt, were stopped by the Court.

(a) 2 Deac. & C. 465. 488.

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Ex parte
PARKES.

ERSKINE, C. J.—To justify the Court in ordering this fiat to be annulled, we must be satisfied that the fiat was issued for the sole purpose of dissolving the partnership, and not for the purpose of distributing the effects of the bankrupt. There may be circumstances of suspicion in the case; but I own the evidence does not quite satisfy me, that the only object of the petitioning creditor in issuing the fiat was to dissolve the partnership between the bankrupt and *Ball & Walker*, without any regard to the distribution of the bankrupt's effects towards the satisfaction of the mortgage-deed.

Sir JOHN CROSS.—It appears to me somewhat extraordinary, that the petitioning creditor, who is one of two trustees, should of his own mere motion sue out a fiat against *Parkes* for the amount of the mortgage debt, without previously demanding the payment of the debt from the two other partners. The solicitor, who issued the fiat, was employed both by the lender and the borrowers of the mortgage-money; and he might have advised the trustee to sue out a fiat in bankruptcy against the petitioner, to promote the object of some of those who employed him. The bankrupt swears, that directions were given by the two other partners to exclude him from the premises, on the ground that he was not a partner. It seems to me not necessary to come to the conclusion, that the affidavit of the petitioning creditor is false; but it is sufficient that his main object was, on the suggestion of the solicitor, to dissolve the partnership between the bankrupt and *Ball & Walker*. Still, I should be unwilling to come to that conclusion; because the solicitor swears to the contrary. But the effect of his actions is the best criterion we have for judging of

his motives; and it is clear, that no benefit will accrue to the petitioning creditor from this fiat, but merely to the two other partners.

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Ex parte
PARKES.

Sir GEORGE ROSE.—I readily admit, that if I could come to the conclusion that this fiat was taken out with the sole object of dissolving the partnership entered into by the bankrupt with *Ball & Walker*, the consequence would be inevitable, that the fiat must be annulled. But although the petitioning creditor appears to be a joint creditor of the partnership, I am not prepared to say, that the solicitor was not justified in advising him to sue out a separate fiat against the bankrupt. A main question in the case is, was there any precise term for which the parties agreed to continue partners? If there was, then there might be some pretence for saying that the fiat was sued out solely to dissolve the partnership; as in that case the object could not be effected by resorting to the Court of Chancery. But there is no pretence for saying here, that there was any term for which the partnership was to be carried on; and the object of a dissolution might therefore be attained by a bill in Chancery, as well as by a fiat in bankruptcy. On the preponderance of the evidence, I think the bankrupt has not made out his case, and therefore the petition must be dismissed.

Petition dismissed, without costs as to the petitioning creditor,—but with costs as to the bankrupt's partners.

1837.

Westminster,
Nov. 18, 1837.

The Court will not discharge a Commissioner named in a country fiat from acting as a Commissioner, in order to be appointed solicitor to the fiat.

Ex parte BRINTON.—In the matter of BROOM.

MR. SWANSTON, on behalf of a solicitor, who was one of the Commissioners named in a country fiat, applied to the Court for an Order that he might be discharged from acting as a Commissioner, and that some other gentleman might be substituted; as the assignees were desirous of appointing him solicitor to the fiat; and he preferred to act in that character.

ERSKINE, C. J.—It appears to me, that it would be a dangerous precedent, if the Court were to grant this application. The gentleman has chosen to be put upon the list of Commissioners for his district, and the Court has nothing to do with his subsequent wish to act as the solicitor to any fiat. It might happen, that from the very circumstance of his being a Commissioner, the assignees wished him to act as the solicitor. Having applied to be put upon the list of Commissioners, he must abide by that determination.

The other Judges concurring,

Motion refused.

Westminster,
Nov. 18 and 21,
1837.

In the matter of AARON LEES.

The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond.

MR. BACON applied to the Court, on behalf of the Northern and Central Bank, for an Order that a fiat be issued against the bankrupt on their docket papers, not-

issued against the bankrupt on their docket papers, not-

withstanding a previous application had been made for a fiat by another creditor at the Bankrupt Office; on the ground, that the first application was made on an insufficient affidavit, which stated "that *Aaron Lees* justly and truly indebted," omitting the word "is." He urged that this was such a material defect, that the office ought to treat it as no affidavit. The omission of the word "is" was of vital importance, and made the docket irregular; and it has been decided, that the creditor who strikes the first regular docket has a right to the fiat; *Ex parte Stocker* (a). On an affidavit to hold to bail, which alleged that the defendant "*in* justly indebted to this deponent," instead of "is justly indebted," the Court of Common Pleas held that it was no affidavit; as no perjury could be assigned upon it; and they discharged the defendant, on filing a common appearance; *Reeks v. Groneman* (b).

1837.

In re
LEES.

Mr. *Swanston*, *contra*, was stopped by the Court.

The COURT held the omission to be a mere verbal inaccuracy; and made an Order, that, on the first creditor filing a proper affidavit within the space of four days, he might have the fiat.

Mr. *Bacon* on this day made another application to November 21. the Court to stay the issuing of the fiat, on account of an alleged irregularity in the bond. The ground of the present application was, that the description of the bankrupt in the docket struck by the Northern and Central Bank was preferable to that in the bond of the other party. The bankrupt traded under the firm of *John*

(a) 1 G. & J. 249.

(b) 2 Wils. 224.

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Lees & Co., and was better known by that name, than by the name of *Aaron Lees*, by which he was merely described in the bond. In the docket papers struck by the Bank, he was described as "*Aaron Lees*, trading under the firm of *John Lees & Co.*," which description was not so likely to mislead creditors, as the other. The fiat ought to be given to that creditor, whose docket papers are the most perfect.

ERSKINE, C. J.—I think this Court ought not to interfere between these two parties thus competing for the fiat. If the Lord Chancellor is satisfied with the bond, we ought not to stop the officer in issuing the fiat. The officer is, in the first instance, to judge of the regularity of the docket papers; and if the fiat is improperly issued, it is then time sufficient for any party to complain.

Motion refused, with costs.



Re CREED.

Westminster,
Nov. 21, 1837.

The Court refused to interfere with the discretion of the Commissioners, by directing them to sign a warrant for the apprehension of a bankrupt who had absconded.

IN this case Mr. *Bigg* applied to the Court for an Order, directing the Commissioners in the country to whom the fiat was directed to sign a warrant for the apprehension of the bankrupt, who, it was sworn, had absconded and taken with him all his property. It was submitted to the Commissioners, that they had authority, under these circumstances, to issue their warrant for the bankrupt's apprehension, under the provisions of the 6 *Geo.* 4. c. 16. s. 27.; but they declined to sign a warrant, because he had not previously surrendered.

ERSKINE, C.J.—We cannot interfere in the matter. The Commissioners are well able to judge what they ought to do ; and if you are dissatisfied with their conduct, the only remedy you have is to apply for another fiat to be directed to other Commissioners.

1837.

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In re  
CREED.

Application refused.

Ex parte WARD.—In the matter of WARD.

Westminster,  
Nov. 21 & 25,  
1837.

**THIS** was a petition by the bankrupt to supersede a commission, which had issued so far back as the year 1811. The bankrupt stated, that all the Commissioners and the assignees were dead, and that in the year 1813 every creditor was paid 20s. in the pound, leaving a surplus which was handed over to the bankrupt ; and that he might then have obtained his certificate, but he considered it unnecessary, as all the creditors were paid in full. It appeared, that the bankrupt was now about to sell an equity of redemption in some freehold property ; and an objection was taken by a conveyancer to his title, on the ground that he had not obtained his certificate.

The Court refused to supersede a commission issued 26 years ago, on the mere application of an uncertificated bankrupt ; although 20s. in the pound had been paid to the creditors, and all the commissioners and assignees were dead.

Mr. *Swanston*, in support of the petition. The bankrupt cannot make a proper title to satisfy the purchaser, unless the commission is superseded. All the creditors having received 20s. in the pound, the commission must be considered as *functus officio*. [*Erskine*, C. J. The difficulty is, that you do not state any one to have been served with this petition.] The petition is not served on any person ; as the Commissioners, the assignees, and

1837.

Ex parte  
WARD.

most of the creditors are dead, and the proceedings under the commission have been delivered up to the bankrupt by the solicitor to the assignees. [*Erskine*, C. J. Should you not take out a renewed commission?] It would appear from the case of *Ex parte Hobbes* (a), that a creditor is the proper party to take out a renewed commission; and every creditor in the present case has been paid in full. Advertisements have been inserted in the newspapers for any creditors to come in, but there are none. The Court has jurisdiction to direct the proper officer to make inquiries, whether all the creditors have not been paid the whole amount of their debts; and if so, to order the commission to be superseded.

ERSKINE, C. J.—I do not see how we can interfere on this occasion, when no other party but the bankrupt himself is brought before the Court.

Sir G. ROSE.—This Court cannot supersede a commission issued so long ago as 1811 on the application merely of an uncertificated bankrupt, without any evidence to confirm the facts stated in the petition.

The matter was directed to stand over for a few days, when

November 25.

Mr. *Swanston* mentioned it again to day. It appears from an affidavit made by the solicitor to the assignees, that all the bankrupt's statements in his petition are confirmed. It is a hard thing upon him, after paying every creditor in full, that his title should be thus kept in suspense. [Sir G. *Rose*. I do not see that we can do any

(a) Buck, 134.

thing more than impound the proceedings.] That would not relieve us, or touch the difficulty. Nothing will do so, without annulling these proceedings or destroying their effect. [Sir *J. Cross*. Unfortunately, the bankrupt swears merely, that all the creditors who *proved* have received 20*s.* in the pound, saying nothing about the claims. What became of them?] It appears from the order of dividend made in June 1813, that the sum of 20*s.* in the pound was ordered to be paid and reserved upon both proofs and claims, and still leaving a balance in the hands of the assignees. I do not press for a supersedeas in the first instance, but merely that it may be referred to the officer of the Court to inquire whether there are any creditors whose debts have not been paid; as the Lord Chancellor is accustomed to direct, in the administration of assets under a will.

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Ex parte  
WARD.

ERSKINE, C. J.—It is difficult to find any principle, upon which this commission should be superseded. The payment of 20*s.* in the pound is not, of itself, enough to entitle the bankrupt to a supersedeas. If that were the established rule, then it would be no doubt proper that an inquiry should be granted to ascertain that fact. But in these cases the interests of the assignees are to be considered, as well as those of the bankrupt's creditors. Now, this is an application made by the bankrupt behind the back of all the parties who were interested under the commission. Without the consent of the creditors, or the certificate of the Commissioners, he has not got machinery sufficient to support the present petition; and therefore I do not think the Court would be justified in directing any inquiry, with the view to a supersedeas.

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Ex parte  
WARD.

Sir J. Cross.—I think we should give the bankrupt what relief we can; but it does not strike me, that the mere fact of his having paid 20s. in the pound would warrant us in superseding the commission. The petitioner does not state any reason why he has not before this obtained his certificate, or applied to have the commission superseded. The case, however, is a very peculiar one. Here is a commission of nearly 30 years standing; all the Commissioners are dead; and the assignees also are dead. There are two questions, then, that offer themselves to our consideration: 1st. Whether after so great a lapse of time since the order of dividend, there is not reasonable evidence that all the creditors have been paid 20s. in the pound; and 2dly. whether there is not satisfactory evidence that the Commissioners have, not indeed *certified* that fact, but *signified* as much by the order of dividend. Without offering a decided opinion on the subject, I merely fling out these suggestions for the consideration of the Court.

Sir G. Rose.—I do not see any principle, that would justify us in superseding this commission, on the application of the bankrupt alone; nor can I imagine to myself, that any difficulty experienced by the bankrupt in selling the property, which he chose to purchase without obtaining his certificate, would afford a sufficient reason for our complying with the prayer of this petition. By superseding the commission, it is very possible that some parties might be seriously damnified. The assignees, or their representatives, would be answerable for all their acts done under the commission. The creditors who have not proved would be barred by the Statute of Limitations. It is not enough to tell us, that 20s. in

the pound has been paid. There may be creditors whose debts may carry interest, and who would thus be entitled to something more than 20s. in the pound. There is no adequate object, as appears to me, for superseding the commission; for the bankrupt might easily procure the commission to be renewed, and then obtain his certificate in the usual course. As there is another remedy, therefore, for the bankrupt to pursue in this case, the Court can make no Order on the present petition.

1837.

Ex parte  
WARD.

No Order made.

Ex parte WILLIAM BAILEY the elder—In the matter of WILLIAM BAILEY the elder, and WILLIAM BAILEY the younger.

THIS was the petition of *William Bailey* the elder, praying to be discharged from an arrest for debt, or that the plaintiff in the action might be ordered to cause an *exoneretur* to be entered on the bail-piece; under the following circumstances:—

In October 1836, a joint fiat was issued against both the bankrupts; and the 6th December following was the meeting appointed for their last examination, which the Commissioner adjourned to the 23d December, on which day the Commissioner adjourned the last examination *sine die*, but made no indorsement on the bankrupt's summons, to protect him from arrest. On a subsequent application made by the bankrupts, on the 9th

Westminster,  
November 23,  
1837.

If the bankrupt's last examination is adjourned *sine die*, and the Commissioner indorses no protection on his summons, the bankrupt is not protected from arrest, although he may previously to being arrested have obtained an appointment from the Commissioner for a day to finish his last examination.

Quere, Whether the Commissioner has the power, after

such an adjournment, to indorse a protection, on any subsequent attendance of the bankrupt. The rule protecting an uncertificated bankrupt from costs applies only to petitions to annul the fiat.

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Ex parte  
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June 1837, the Commissioner appointed the 23rd June 1837, for the last examination of the bankrupts, of which due notice was given in the Gazette; but still no indorsement was made by the Commissioner on the bankrupt's summons. It was in this interval, namely, on the 19th June, that the petitioner was arrested in an action for debt, to which he put in bail for 100*l*. On the 23rd June 1837, the petitioner attended before the Commissioner, and was examined; when the examination was adjourned to the 5th July, on which day the examination was again adjourned to the 12th July, when it was further adjourned to the 6th November. On each of these occasions the usual protection was indorsed on the bankrupt's summons.

On the 24th June 1837, the petitioner took out a judge's summons for the plaintiff to show cause why the bail-bond should not be delivered up to be cancelled. This summons was returnable on the 26th June; when Mr. Baron *Gurney* refused to interfere, on the ground that the petitioner could not produce any protection from the Commissioner at the period of the arrest; but he made an order that the petitioner should have five days allowed him to put in special bail, on paying the costs of the proceeding. The petitioner accordingly put in special bail, and the plaintiff afterwards declared in the action.

Mr. *Swanston*, and Mr. *Teed*, in support of the petition, referred to the 117th and 118th sections of the 6 *Geo.* 4. c. 16. By the 118th section the Commissioners are empowered, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination *sine*

*die*, and the bankrupt is declared to be free from arrest or imprisonment for such time, not exceeding three calendar months, as they shall by indorsement upon such summons appoint. This is the first statutable provision, which gave the Commissioners power to adjourn the examination *sine die*; and it became then an incidental practice, that after the examination was adjourned *sine die*, the Commissioners appointed another day. The 117th section of the act declares, that the bankrupt shall be free from arrest or imprisonment by any creditor, in coming to surrender during the forty-two days, and such *further time* as shall be allowed him for finishing his examination; provided he was not in custody at the time of such surrender. We contend, on the part of the bankrupt, that the period during which his examination was adjourned *sine die* was "further time," within the meaning of the last section. It is true, the Commissioners did not indorse the bankrupt's summons, when his examination was adjourned *sine die*; but it is unnecessary to argue, that it is either the indorsement, or the summons, that protects the bankrupt; it is clear that it is neither the one, nor the other, but the statute. The giving the indorsement, or withholding it, does not in any way affect his protection from arrest. [*Erskine*, C. J. The indorsement on the summons is evidence of the fact, although that alone does not give the protection. Under the 118th section, I take it, there must be an indorsement to give a protection. The protection under the 117th section is wholly independent of any indorsement of the Commissioners. Then the only question is, whether a mere appointment of the Commissioner on the 9th June, for the bankrupt's examination on the 23rd, is sufficient to give the bankrupt a protec-

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tion during the whole of that interval.] Supposing that the Commissioner had adjourned the examination from December to the 9th June, and had then adjourned it again to the 23d June, would not the bankrupt, in that case, have been protected? We are not contending, that if the Commissioner had appointed a private meeting for examining the bankrupt, an appointment of this description would have given the bankrupt a protection. But here the Commissioner appointed a public meeting, for the express purpose of the bankrupt passing his last examination. [Sir J. Cross. Was there a summons issued in the present instance? For the bankrupt is not bound to attend without a summons.] That may be the case in the original proceedings under the fiat. But if we show, that the bankrupt knew of the appointment, and that it was made by the Commissioner at the bankrupt's own instance, this would be tantamount to a summons being served upon the bankrupt. He applied to the Commissioner to be permitted to pass his last examination, and notice was given him of the meeting appointed for that purpose. By the terms of the 116th section of the Bankrupt Act, the bankrupt is at liberty "at all seasonable times before the expiration of the forty-two days, or *such further time* as shall be allowed him to finish his examination, to inspect his books, papers, and writings," for the purpose of making out the accounts of his estate. Now this purpose would be defeated, if any creditor might arrest the bankrupt in the interval between the time of the Commissioner making the appointment, and the day fixed for the last examination. [Erskine, C. J. The act says, that the Commissioners cannot give the bankrupt protection for more than three calendar months, after an adjournment *sine die*.]



[Sir G. Rose. The Commissioner also himself names the day, in the first instance, for an adjournment of the examination, unless he adjourns it *sine die*.] Although the adjournment *sine die* might not protect the bankrupt, before the Commissioner had appointed a definite time for the examination; yet when the adjournment *sine die*, which was at first indefinite, had afterwards become definite, the bankrupt was, from that moment, entitled to his protection. It is not necessary that the period of time, for the adjournment of the bankrupt's last examination, should be continuous from the end of the forty-two days. [Sir G. Rose. When the adjournment in December was *sine die*, what reason is there for saying, that that was giving time till June?] [Erskine, C. J. My view of the case is, that after an adjournment *sine die*, the Commissioners have no power to give the bankrupt a protection for more than three months from the time of such adjournment.] We submit, that after an adjournment *sine die*, the Commissioners have still power to take the bankrupt's last examination, and to give such time as may be sufficient for that purpose. The Commissioner, on the 9th June, by appointing a meeting for the 23rd June to take the bankrupt's last examination, did, in effect, give the bankrupt further time for finishing his examination, within the meaning of the 117th section of the Bankrupt Act. There is no pretence, that the creditor who arrested the bankrupt was not aware of the adjournment of the examination.

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Mr. Anderdon, *contra*, was stopped by the Court.

ERSKINE, C. J.—The Court is of opinion, that the bankrupt's application cannot be acceded to. The

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117th section declares, that the bankrupt shall be only free from arrest "during the said forty-two days, and such further time as shall be allowed him for finishing his examination." It is quite clear, therefore, that the legislature, by thus expressing itself, was contemplating one protection for the forty-two days, and such continuous time as the Commissioners might allow. The subsequent sections do not alter this construction. The 118th section gives the Commissioners power to adjourn the examination *sine die*; a provision, which was intended to remedy the evils that might arise from continuous fruitless adjournments. But the legislature, cautious to prevent the abuses which might arise if an adjournment *sine die* gave the bankrupt a protection from arrest for an unlimited period, expressly declares that the protection shall not exceed three calendar months. It has been contended, that the subsequent appointment of a special day for the bankrupt's examination brought the case again within the 117th section, and that such appointment was the allowance of further time, within the meaning of that section. It appears to me, however, that the 117th section will not bear the interpretation contended for. Suppose the bankrupt had been arrested after the adjournment *sine die*, and before the fixing a day for his last examination; then, according to the argument, he would have been entitled to be discharged, as soon as a day was fixed for his last examination. But I think this is contrary to the meaning of the act; and that, in the present instance, the bankrupt was only protected *eundo, morando, et redeundo*.

Sir J. CROSS.—My first impression was, that the bankrupt was protected from arrest, on the ground that the

adjournment *sine die* was giving further time by an indefinite adjournment; but I am now of a different opinion. And I think that the circumstances of the case are against the application, independently of the law. When the Commissioner adjourned the bankrupt's examination *sine die*, he made no indorsement on the bankrupt's summons; which shows that he did not think very favorably of the bankrupt's conduct. The bankrupt then lies by for half a year; and just before the arrest, he asks the Commissioner to appoint a day for finishing his examination; and then, upon being arrested, he turns round on the plaintiff, and insists on his exemption from arrest. This, I own, appears to me very like a contrivance of the bankrupt to defeat the writ.

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Ex parte
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Sir GEORGE ROSE.—This petition, on the face of it, carries with it its own dismissal. The strongest argument in favor of the application was, that unless the adjournment in June was held to be "further time," within the meaning of the 117th section, the bankrupt would lose the benefit of the 116th section, which declares that he shall be at liberty, during the further time that may be allowed him to finish his examination, to inspect his books and papers for making out his accounts. But this consequence does not necessarily follow. The act of parliament contemplates two cases: 1st, where the bankrupt passes his last examination; 2dly, where he does not. The 117th section provides for the first case; and I ask any one conversant with the practice in bankruptcy, whether the expression "further time" in that section has not always been understood to mean some continuous period after the 42d day; and whether the practice of allowing further time is not with a view of

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granting a definite time ; and, when further time is applied for and granted, whether the practice has not always been, to put an indorsement to that effect on the bankrupt's summons? After an adjournment *sine die*, the 118th section expressly limits the bankrupt's protection to a period of three months ; and, in this case, that protection was withheld by the Commissioner, as he omitted to indorse the summons. It would be of most mischievous consequence, if, when such protection is purposely withheld by the Commissioner, the subsequent appointment of a day for the further examination of the bankrupt was to have the effect of interposing a protection, after so great a lapse of time from the adjournment *sine die*. This appears to me quite contrary to the intention of the legislature, and the language of the act. And I think it is very questionable, after an adjournment *sine die*, without any protection indorsed on the bankrupt's summons, whether the Commissioner has any power afterwards of indorsing a protection, on the occasion of any subsequent attendance of the bankrupt.

Mr. *Anderdon* applied for costs against the bankrupt.

Mr. *Teed*. It is not usual to give costs against an uncertificated bankrupt.

ERSKINE, C. J.—Is an uncertificated bankrupt to be free from costs, whatever may be the application which he thinks proper to make to the Court? The rule protecting a bankrupt from costs applies only to a petition to annul the fiat. Who is to pay the costs in this case, if the bankrupt does not? The respondent is a stranger to the fiat.

Petition dismissed, with costs.

Ex parte DOLLY.—In the matter of BOWERMAN.

THIS was the petition of a mortgagee of an estate of the bankrupt, calling on the assignees to complete the sale of the estate, by executing the conveyance to the purchaser, and on the purchaser to pay the purchase-money; and praying, that so much of the purchase-money might be paid over to the petitioner, as would be sufficient to satisfy his mortgage.

It appeared, that there was a second mortgage on the property, and that the estate had been put up to sale by auction in two separate lots, one of which had been bought by a Dr. *Wootton*, and the other by a Mr. *Brown*. All the parties interested appeared before the Court on the 18th July last, when an Order was made, on the statement of the petitioner, and on affidavits filed on behalf of one of the purchasers, whereby it was ordered (amongst other things) that both the purchasers should pay into Court the amount of their respective purchase-moneys, without interest; and that the costs of the petitioner, of the two purchasers, and of the second mortgagee should be paid out of the purchase-money, and the costs of the assignees out of the bankrupt's estate.

Mr. *Swanston*, on behalf of the assignees, now applied to vary the minutes of the Order, by introducing in it a direction, that the costs of the assignees occasioned by the sale of the property should be paid out of the purchase-money.

The COURT, after conferring with the Registrar, said, that as such appeared to be the practice, a direction to that effect might be inserted in the Order.

1837.

Westminster,
Nov. 24, 1837.
When there is no variation between the minutes and the Order, as pronounced by the Court, the Court will not entertain an application to vary the minutes; the proper course for any party dissatisfied with the Order being, to apply for a re-hearing.

1837.


Ex parte
DOLLY.

Mr. *Deacon*, on behalf of the second mortgagee, then applied to the Court to reconsider the minutes, as to the payment of the purchase-money by the purchaser, without interest; on the ground, that the contents of the affidavit made by the purchaser, (on the statement of which the direction in the order was founded, as to the non-payment of interest,) were not known to the second mortgagee, when the Order was pronounced by the Court. He was desired to say, that the statement in the affidavits as to the delay in completing the purchase, and the appropriation of the purchase-money, could be satisfactorily answered; and that the second mortgagee would be materially affected, if both these purchasers were to pay no interest from the day on which their respective purchases were to be completed; as there would not, in that case, be sufficient from the proceeds of the sale to satisfy the claim of the second mortgagee. As the minutes of the Order were now brought before the Court by the assignees, the Court perhaps would feel themselves justified in reconsidering them, so as to do substantial justice to all parties. And as the minutes contained a reservation, that any of the parties might apply to the Court in the matter as they should be advised, the inference was, that the minutes were not to be considered final and conclusive. The Court was not so tied up, as to its rules of practice, that it could not vary the minutes, to prevent injustice being done to any party.

The COURT said, (*Sir J. Cross dissent.*), that the second mortgagee ought to have been prepared, on the former occasion, to support his objection to the disallowance of interest on the purchase-money; that as there

was no variation between the minutes and the Order that was pronounced on the former hearing, the minutes could not be altered; and that the only remedy of the second mortgagee was, to present a petition for re-hearing.

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Mr. *Rogers* appeared for the petitioner, the first mortgagee.

Mr. *Bethell*, and Mr. *E. Montagu*, for the principal purchaser.

Mr. *Sturgeon*, for the other purchaser.

In the matter of *DIACK*.

MR. *KEENE*, on the part of the bankrupt, moved for an Order to commit a party of the name of *Welch* to the prison of the Fleet, for not paying to the bankrupt the costs of a petition, pursuant to a former Order of the Court; by which it was directed that the costs should be paid to the bankrupt, or *Thomas Oliver*, his solicitor. The motion was founded on an affidavit that *Welch* had been served with the usual four day Order, and that on the 18th November the bankrupt served him with a peremptory Order, and at the same time personally demanded the payment of the costs. There was also an affidavit of *Oliver*, that he had not received the amount.

Westminster,
Nov. 25, 1837.
Where costs are directed to be paid to A., or his solicitor, a personal demand by A. alone is sufficient to ground an application for a committal of the party, for non-payment of them.

The COURT inquired whether the affidavit stated that a demand had also been made by *Oliver*; but, on consideration, thought the demand by the bankrupt was sufficient, and granted the application.

1838.

Westminster,
January 16,
1838.

A. & B., joint-traders, on the 25th February execute a deed of assignment to trustees, for the benefit of their creditors. On the 25th March, a separate fiat issues against *A.*, and on the 10th August a joint fiat against *A. & B.* The trustees under the deed petition to annul the joint fiat, on the ground of *B.*'s infancy; but it appearing that he was also an infant at the date of the trust deed: *Held*, that the trustees had no *locus standi*; and that even if they were legal creditors, they could not petition to annul the joint fiat, till they got rid of the previous separate fiat.

Quære, whether a joint fiat is invalid, because one of the parties against whom it is issued is attainted of felony.

Quære, whether the Commissioners are not bound to open, and adjudicate upon, a second or third fiat, although issued against an uncertificated bankrupt.

Ex parte THOMAS FENN ADDISON and WILLIAM WASHBOURN.—In the matter of JOHN BEARD, and JOHN BLOUNT HERBERT.

THIS was the petition of creditors under a trust deed, to annul the fiat, under the following circumstances.

The bankrupts, on the 1st November 1836, entered into partnership as timber and coal merchants at Gloucester, *Beard* having previously carried on the same business on his own account. In the course of *Beard*'s separate trading he incurred a debt to *Dunnelow*, the petitioning creditor, for goods sold and money lent, for which he gave him three bills of exchange, which were dishonoured; and on the 17th January 1837 *Dunnelow* obtained from *Beard* another bill purporting to be the joint acceptance of the bankrupts for the sum of 200*l.*, the consideration for which, as alleged by *Dunnelow*, was the three bills which had been so dishonoured by *Beard*. The petitioners, however, charged that this bill was accepted by *Beard* alone, without the knowledge or privity of *Herbert*, and upon some accommodation transaction between *Beard* and *Dunnelow*, and not in consideration of the three dishonoured bills. On the 25th February 1837 *Beard & Herbert* executed a deed of trust, by which they assigned over all their estate and effects to the petitioners, in trust for themselves and the other creditors of *Beard & Herbert*; and on the 27th February *Beard* executed an assignment of his separate estate to trustees, for the benefit of his separate creditors. On the 25th March 1837 a separate fiat issued against *Beard*. On the 7th August 1837 *Beard* was convicted at the Gloucester Assizes of uttering forged bills of ex-

change, and was sentenced to be transported for life. On the 10th August 1837 a joint fiat was issued against *Beard & Herbert*, on the opening of which the petitioners attended before the Commissioners and protested against the validity of the fiat, as well on the ground that there was not a good petitioning creditor's debt, as on the ground of *Beard* being an attainted felon, and the alleged minority of *Herbert*; but the Commissioners adjudged them both to be bankrupts. The petitioners stated, that at the time of the issuing of the fiat, they had got in and realized to a considerable extent the produce of the partnership estate of *Beard & Herbert*, and were about to declare a dividend, when they were prevented by the issuing of the fiat. A separate fiat had also been issued against *Beard*, which prevented the execution of the trusts under the assignment of *Beard's* separate estate; but a dividend of his separate estate had been declared under this fiat for the benefit of his separate creditors.

The petitioners prayed, that the joint fiat might be annulled, at the costs of the petitioning creditor.

Mr. *Swanston*, and Mr. *Keene*, in support of the petition. First, with respect to the objection on the ground of the infancy of *Herbert*. It has been decided in the case of *Belton v. Hodges (a)*, that a commission of bankrupt issued against an infant is not merely voidable, but absolutely void. [Sir *G. Rose*. If the separate fiat against *Beard* was issued within six months after the date of the trust deed, and the deed is void as against *Beard*, it is void also as against *Herbert*. Your title was destroyed by the separate fiat.] Although the as-

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(a) 9 Bing. 365.

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signees of *Beard* under the fiat can annul the trust deed as against him, still they cannot do so, as against *Herbert*.

Mr. *Bethell*, who appeared for the petitioning creditor, here observed, that it was sworn that *Herbert* was an infant at the date of the trust deed, as appeared by the affidavit of his own mother.

Mr. *Swanston*. It is stated in one of our affidavits, that on the trial of an action against *Beard & Herbert*, in which the latter pleaded his infancy, it was proved that he obtained a license of marriage in September 1834, upon which occasion he swore that he was then twenty-one years of age, and that the jury gave a verdict against the infancy. The verdict of a jury is therefore stronger on this point, than a mere affidavit. [Sir *J. Cross*. That was *res inter alios acta*.] Another objection is, that before the fiat issued, *Beard* was attainted of felony. Now, though an attainder may in some cases not affect the property, yet it affects the person, of the felon, so as to render a fiat in bankruptcy wholly inoperative against him. *Ex parte Bullock* (a), and *Coppin v. Gunner* (b), are sometimes cited against this proposition; but they rather make, and especially the last-mentioned case, in favour of it; for though leave was there given to charge a felon convict with civil process, the Court made it a condition that the plaintiff should not sue out execution against the *person* of the felon. In *Macdonald's* case (c), where an application was made to discharge the civil process, with

(a) 14 Ves. 452.

(b) 2 Lord Raym. 1572.

(c) Fost. C. L. 61.

which an attainted felon stood charged, on the ground of an intention in the Crown to pardon him, the Court declined giving any opinion on the main question, because the pardon had not passed the Great Seal. But in *Foxworthy's* case (*a*), where an attainted felon had pleaded a pardon, which was allowed by the Court of King's Bench, and a creditor moved to charge him with a civil action, as in custody of the marshal, the Court refused the motion; as it would defeat the effect of the pardon (*b*).

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Another objection to the validity of the fiat is, that the acceptance was given by *Beard* to *Dunnelow*, without the authority or privity of *Herbert*.

Mr. *Twiss*, who appeared for the assignees, and Mr. *Bethell*, for the petitioning creditor, were stopped by the Court.

ERSKINE, C. J.—If the petitioners could show that they had any interest, so as to entitle them to present this petition, the Court would take the various objections that have been urged against the validity of the fiat into mature consideration. It is a rule in bankruptcy, that the Court will not interfere to annul a fiat, unless on the application of the bankrupt, or a creditor, or some person interested in removing the fiat out of the way. But

(*a*) 2 Ld. Raym. 848.

(*b*) Mr. Justice *Foster*, in a note subjoined to the case of *Aeneas Macdonald*, says, "The rule in *Foxworthy's* case seems to have been overhasty, and the reasons on which it is grounded appear to me to be inconclusive; that in *Coppin v. Gunner* seems more equitable, since it secured to the defendant the benefit of his pardon, without prejudice to the plaintiff, who might resort for satisfaction to the effects of the defendant, if he could find any."—*Fest. C. L.* 62.

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the petitioners here have no interest to give them a *locus standi*, on a petition to annul the joint fiat. They allege, that they are aggrieved by the joint fiat, because it prevents their acting under the trust deed, and they are liable to be sued by the assignees for the property they have realized under it. But suppose the joint fiat annulled, still the separate fiat would remain, and be the cause of similar grievance; and the separate fiat was issued before *Beard* was attainted of felony. The petitioners therefore have nothing to complain of. All the joint property would be subject to be administered under the separate fiat, and *Beard's* share of the joint effects, after paying the joint creditors, would be liable to distribution among his separate creditors. Besides, the trust deed appears to me to be void, having been executed within six months previous to the issuing of the fiat. It is contended, however, that though the deed is void as against *Beard*, it is not void as against *Herbert*. But I think it void as against both. Still, supposing this not to be so, it appears plainly by the affidavit of *Herbert's* mother, that he was an infant, not only at the time of suing out the joint fiat, but at the time of the execution of the trust deed. Then it has been urged, that this allegation of infancy is contradicted by the verdict of a jury in an action brought against *Beard* & *Herbert*, in which *Herbert* pleaded his infancy. But that verdict appears to have proceeded on the ground of *Herbert* having previously sworn that he was twenty-one, for the purpose of obtaining a marriage license, which estopped him from availing himself of the plea of infancy in the action. It seems to me, therefore, that the evidence of *Herbert's* mother is stronger on this point, than the verdict of a jury obtained under such cir-

cumstances. It is true, the assignees cannot set up the infancy, as that would render their own title invalid. If the petitioners had any interest in this matter, the Court might have been disposed to deal with their petition. The dismissal of this petition, however, does not interfere with the legal rights of the petitioners; they are still at liberty to proceed at law. All that the Court says now, is, that it ought not to interfere, at their instance, to dispose of this fiat.

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Sir JOHN CROSS.—If this petition had been presented by a legal creditor to annul the fiat, a *prima facie* case perhaps has been made to call for an answer. But the question is, whether the petitioners are creditors of the bankrupts under the trust deed. Now, all the evidence in the case shows the utter invalidity of the deed. The petition is *felo de se*. For if *Herbert* were an infant when the fiat issued, he was so, when he executed the trust deed, under which the petitioners claim. They have therefore no *locus standi* to come here and call upon us to supersede the fiat.

Sir GEORGE ROSE.—The petitioners come here, as trustees under the deed of February 1837, and ask us to annul the joint fiat against *Beard & Herbert*. But as a fiat was issued against one of those parties within six months from the date of the trust deed, their title under that deed is good for nothing; for if the deed is void against *Beard*, it is void against *Herbert*. Even if the petitioners were creditors, it would make little difference in their favour; and the utmost the Court could do for them would be, to order the petition to stand over, to serve the assignees under the separate fiat. A fiat

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against one of two partners operates like an execution, in taking all the joint property, subject to an account. The assignees, therefore, under the separate fiat against *Beard* would have had a right to take all the joint chattels of the partnership, subject only to their liability to account to *Herbert*. The facts of the case are an answer to the petition. The petitioners say, they are embarrassed by the joint fiat; the answer is, there exists a separate fiat also, which creates equal embarrassment; the petitioners ask to annul the joint fiat, because of their previous assignment; while another assignment exists, which defeats the title of the petitioners, namely, that under the separate fiat. This Court has often said, that there is no necessity for the assignees under a first fiat to apply to annul the second, except under very peculiar circumstances. Then, *a fortiori*, in this case, does no such necessity prevail; as the first fiat would equally prevent the petitioners from administering the joint property under the trust deed. But the case does not rest here. It appears by the affidavit of *Herbert's* own mother, that he was not of age when the joint fiat was issued; but it appears also by the same affidavit, that he could not have been of age when the trust deed was executed. The deed, therefore, would fall by the same blow which overthrew the fiat. Then, as to the question of attainder. It may be a question, when one of two partners is attainted of felony, whether it may not be necessary to include him in a joint fiat, where complicated matters of account are involved; though it might not be proper to make him the subject of a separate fiat. But I give no opinion on that point, my judgment being founded on the fact, that the petitioners have no *locus standi* in Court whatever; as their right is wholly

destroyed by the first fiat. It is very possible, that the assignees under the joint fiat may find themselves in some difficulty, with reference to the effect which the first fiat may have, as against their title ; but an arrangement may be made between the two sets of assignees, so as to give a perfectly good title to those under the joint fiat. If the petitioners are in possession of any property of the bankrupts under the trust deed, probably all parties will feel it most advantageous to enter into some arrangements with each other.

Although not strictly applicable to the present question, I shall probably not find a better opportunity for observing, that an error has got abroad, and been acted upon, that when a second fiat is issued against an uncertificated bankrupt, the Commissioner cannot adjudicate upon it (a). This idea would do much mischief, if it prevailed in practice. I know of cases where former London lists of Commissioners have declined to open a separate commission, because a previous joint commission had issued, which included the same party. But when such cases were brought before Lord *Eldon*, he invariably declared that the Commissioners ought to open every commission that was directed to them. The erroneous idea to which I allude has arisen from the circumstance, that the case of *Ex parte Welsh* (b), which occurred before Lord *Brougham*, is not so fully reported as could be wished. In that case Lord *Brougham* recognized the proposition, that a second fiat issued against an uncertificated bankrupt was not necessarily void ; it being in the discretion of the Lord Chancellor to remove either one fiat, or the other, out of the way, and leave the other good, according to the convenience and in-

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(a) See *Re Chambers*, 2 Deac. 494.(b) *Mont.* 276.

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terests of the different sets of creditors, and other reasons which might induce him to prefer one to the other. Therefore, as between the Court above and the London Commissioners, the question is not, whether it is a first or third fiat; their duty is to open all fiats directed to them, and leave it to this Court, or the Lord Chancellor, to determine which fiat would be more advantageous to be worked.

Mr. *Swanston* now suggested, that the petitioners could adduce satisfactory evidence that they were creditors of the bankrupts, independently of the trust deed.

Sir JOHN CROSS.—Even supposing the petitioners to be creditors, still that would not give them a right, under all the circumstances disclosed in the case, to present this petition; for, by their own showing, one of the bankrupts is an infant, and therefore incapable of contracting any legal debt, except for necessities. I do not see, therefore, that the circumstance of their being creditors would give them any better right.

ERSKINE, C. J.—It appears to me, that the joint fiat is no obstruction whatever to the petitioners, until they get rid of the previous separate fiat.

Petition dismissed, with costs.



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Ex parte ROBERT SCOTT, Esq.—In the matter of

SHIRLEY.

Westminster,
Jan. 16, 1838.

THIS was the petition of a barrister, who had been appointed one of a district list of Commissioners, under the 1 & 2 Will. 4. c. 56. s. 14., complaining of the conduct of the solicitors, in not having summoned him to attend the opening of the fiat. The fiat issued on the 28th September 1837, and the adjudication took place on the 5th October; and the petitioner alleged, that although he was ready and willing to attend the opening of the fiat, yet he was never summoned for that purpose, nor at either of the public meetings for the choice of assignees, and the bankrupt's last examination. The prayer was, that the proceedings under the fiat might be declared to be void, and that the petitioner might be regularly summoned to attend future meetings; or that the solicitors to the fiat might be ordered to pay all the fees which the petitioner would have received, if he had been regularly summoned to attend the opening of the fiat and the subsequent meetings; and that in either case they might pay the costs of the present application.

A solicitor issuing a country fiat is bound to summon a barrister, who is one of the Commissioners named in it, although the solicitor may think him disqualified from acting as a Commissioner.

Seemle, that two travelling fees cannot be taken by a Commissioner for two meetings under different fiats held on the same day, and at the same place.

In answer to the petition, one of the solicitors made an affidavit, stating that the deponent and his partner did not summon the petitioner, because he, in their judgment, was in the habit of charging and receiving improper and illegal fees for attending and acting as a commissioner; that the petitioner did not reside so far as seven miles from Kidderminster, where the meetings under fiats were held; and that on some occasions the petitioner, having been summoned to attend two meetings

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under different fiats on the same day, charged and took a travelling fee of 3*l.* under each fiat, although he made only one journey to attend both meetings.

In reply, the petitioner, by his affidavit, admitted that he had taken two fees of 3*l.* on the same day, when he had travelled from his house to Kidderminster, to attend two meetings under different fiats; and that he believed he was fully entitled to receive such fees; that the fees were so taken, without any demand on his part, or any objection made on the part of the solicitor; and that he had made diligent inquiry, and found it to be the general practice of Quorum Commissioners, being barristers, to take the same fees; that he believed his house was distant seven miles from the Black Horse Inn, where the bankrupt meetings were held at Kidderminster; for that he was always charged that distance when travelling; that the post-horse duty was charged for seven miles, and that the mileage of the royal mail was also charged for that distance.

In rejoinder, it was stated by the solicitor, that the distance from the petitioner's house to the Black Horse was, by admeasurement, six miles, six furlongs, and thirty yards only. But the party who had measured the distance had omitted to make any affidavit, as to this fact.

Mr. *Bethell*, in support of the petition. The petitioner is entitled to be summoned, under the provisions of the 6 *Geo.* 4. c. 16. s. 23., which directs, that "at every meeting under any commission to be executed in the country, wherein any one or more of the Commissioners

named may be a barrister or barristers, such barrister or barristers, or as many of them as shall be willing to attend, not exceeding three at each meeting, shall be the acting Commissioner or Commissioners, and shall be entitled to his or their summonses and fees accordingly, in priority to any of the other Commissioners in the said commission named." The petitioner is also entitled to the fees he has received, under the previous section of the act (section 22), which declares "that the Commissioners shall receive and be paid the fee of 20s. each Commissioner for every meeting; and where any commission shall be executed in the country, every Commissioner, being a barrister at law, shall receive a further fee of 20s. for each meeting; and in case the usual place of residence of such Commissioner, being a barrister, is distant seven miles or upwards from the place where such meetings are holden, and he shall travel such distance to any such meeting, he may receive a further sum of 20s. for every such meeting." In *Ex parte Williams* (a) it was held, that if the solicitor to the fiat wilfully omitted to summon any of the Quorum Commissioners, the Court would compel him to indemnify the Commissioner for the fees of the meetings to which he ought to have been summoned, besides visiting the solicitor with costs. And the previous case of *Ex parte Douglas* (b) is to the same effect. The answer of the solicitor, in the present case, is a personal attack on the Commissioner, accusing him of taking improper fees.

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Mr. *Swanston*, and Mr. *J. Russell*, *contra*. The reason why the solicitors did not summon the petitioner was, because having taken two travelling fees, where

(a) 1 Deac. 596.

(b) 4 Deac. & C. 768.

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only one journey was performed, which was illegal, the Commissioner became incapable of acting as a Commissioner under the provisions of the 22d section of the Bankrupt Act, which declares that every Commissioner who shall receive from the creditors, or out of the estate of the bankrupt, any further sum than what is there specified, "shall be disabled for ever from acting in such or any other commission." [*Erskine*, C. J. I observe, by the 58th section of the Bankruptcy Court Act^(a), it is there enacted that if any Commissioner, or other officer, shall wilfully demand or take any fee, other than what is allowed by that act, and any other act relating to bankrupts, such person, *when duly convicted thereof*, shall forfeit the sum of 500*l.*, and be incapable of holding any office. This enactment is different from that contained in the former statute of 6 *Geo.* 4. c. 16. s. 22.; but, as the last act does not say that the Commissioner shall be disqualified from acting as a Commissioner in any other commission, but incapable of holding any office, perhaps it does not repeal the former provision of the 6 *Geo.* 4. c. 16. s. 22.] No application is made by the solicitor against the Commissioner in the present instance; but it is the Commissioner himself, who brings the matter before the Court. [*Erskine*, C. J. Can the solicitor take on himself to decide this question, and refuse to summon the Commissioner? If he was guilty of misconduct, should not a petition have been presented against him?] The solicitor, it is submitted, would have no *locus standi* on a petition to remove a Commissioner. But as he knew that the Commissioner had taken an improper fee under other fiats, which by 6 *Geo.* 4. c. 16. s. 22., disqualifies him from acting as a Commissioner, the solicitor had

(a) 1 & 2 *Will.* 4. c. 56.

reason for apprehending that if the Commissioner had been summoned under the present fiat, every thing done by him would have been void.

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ERSKINE, C. J.—Is it intended to be argued, that at any time afterwards, all the proceedings under a fiat become void, because it is discovered that at some time or other one of the Commissioners had taken, perhaps accidentally, an improper fee under another fiat? If that is the case, a Commissioner may inadvertently take a travelling fee, where the distance is a yard within the seven miles, and the solicitor for this cause may refuse to summon him. The question is not, whether you can be compelled to pay an illegal fee to a Commissioner,—for the solicitor is certainly not bound to pay illegal fees,—but whether, as the Commissioner is on the list, the solicitor is not bound to summon him, pursuant to the requisitions of the statute. Can a solicitor refuse to summon Commissioners, because in his judgment, which may be erroneous, the Commissioner has, on some former occasion, taken an illegal fee? Should not the solicitor, in this instance, have summoned the Commissioner, and if he demanded 3*l*. have refused to pay it, and have tendered 2*l*? That seems to be the extent of the power of the solicitor.

Sir GEORGE ROSE.—There is no doubt but that a Commissioner, who takes improper fees, is disqualified from acting as a Commissioner. But how can this Court deal with the matter on this petition? Should not the solicitor present a petition for an order of the Court, to disable the Commissioner from acting on any commission whatever, if what the solicitor now states be

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correct? All the facts now alleged against the Commissioner were known to the solicitors, when they issued the present fiat; and if what they now urge be true, why did they suffer a fiat to be directed to this Commissioner? Would not these things, if true, have justified the Court in annulling the fiat, with costs, as against the solicitors?

Mr. *Swanston*. It is submitted, that the refusal of the solicitors to summon the Commissioner is a proper mode of trying the question. The Commissioner had no right to charge any travelling fee, as his place of abode was not seven miles from the place of meeting. It is no argument to say that the post-horse duty is charged for seven miles; because the duty would be charged for that distance, if it was one yard above six miles. [Sir *J. Cross*. It does not appear, whether the distance was measured by the usual carriage road, nor (which is more material) that any affidavit has been made by the party who actually made the admeasurement. This, on so grave a question, is indispensable.] If such is the opinion of the Court, we will waive that point, and rely on the objection in respect of the two travelling fees. There were two meetings at the same place on the same day; and therefore the Commissioner could only be entitled to one travelling fee. In *Ex parte Haslem*(a), where it appeared that the attendance of a barrister at the place where a commission was to be executed could not be procured, but on the payment of a large sum for travelling expenses, Lord *Eldon* held, that he was not entitled to have his name inserted in the commission, under Lord *Loughborough's* Order(b).

(a) 1 Rose, 58.

(b) 12th August 1800. See 2 Deac. B. L. 95.

But the case of *Rex v. The Justices of Warwickshire*(a) is still more in point, on the present question. That case related to the travelling fees, which a coroner was entitled to charge for one journey to the same place on the same day, to hold three inquisitions; and it was held by the Court of King's Bench, that he was not entitled to 9*d.* a mile, as upon three distinct journies; as the act of 22 *Geo. 2. c. 29. s. 1.* only gave him a fee of 1*l.* for each inquisition, "and for every mile which he shall be compelled to travel from the usual place of his abode, to take such inquisition, the further sum of 9*d.*, over and above the said sum of 1*l.*" And Lord C. J. *Abbott* there says, "It is clear, that he has taken but one journey to the same place, to hold one of the inquisitions. Then as to the others, he makes no journey at all, because they are held at the same place, and on the same day." [Sir *J. Cross*. The same party is to pay all the fees in the case of the coroner.] [Sir *G. Rose*. Which party do you say is to have the preference of being excused from the travelling fee?] The first meeting is to be charged with the fee, of course. [Sir *J. Cross*. Suppose the Commissioner brought two actions against the respective solicitors, under different fiats, for the amount of his travelling fees,—would either have any defence? Could either of them plead, that the other solicitor ought to pay the travelling fee?] It is sufficient to say here, that the fees were not warranted by the statute. In *Ex parte Kirby*(b) it was held, that if Commissioners take more than the statuteable fees, they are perpetually disqualified from acting as Commissioners, even though their conduct might arise, in some degree, from error in judgment. If, according to *Ex parte Kirby*, a Commis-

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(a) 8 Dow. & Ry. 147.

(b) Mont. & M. 405.

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sioner cannot take an illegal fee under the same fiat, how can he take one under two different fiats? What distinction is there as to the illegality?

The COURT asked the petitioner's counsel, if he would be content with a declaration that he ought to have been summoned, together with the costs of the petition; without insisting on his fees?

Mr. *Bethell*, replying in the affirmative, was then stopped by the Court.

ERSKINE, C. J.—I am of opinion, that the solicitors were wrong in this case, in not summoning Mr. *Scott*. The petitioner alleges, that he was ready and willing to attend the meetings under the fiat, but that he was not summoned by the solicitors. Now, the solicitors do not deny that the petitioner was one of the barristers to whom the fiat was directed, or that he was willing to attend the meetings under it. But the defence urged by the solicitors is, that Mr. *Scott*, under some former fiat, had taken improper fees; and that as he was thus disabled from acting as a Commissioner, the solicitors thought it was not their duty to summon him. The Court, giving credit to the solicitors for their motives on this occasion, is willing to make the order against them as lenient as possible. Then the solicitors allege, that Mr. *Scott*'s residence is not seven miles from the place of meeting; but the affidavits that have been filed do not establish that fact. The order of the Court, however, does not turn on that circumstance. My impression is, that Mr. *Scott* acted erroneously in taking two travelling fees for two meetings held the same day, at the

same place; though I admit, if two summonses should be sent to a Commissioner for two meetings under different fiats, a difficulty might arise, as to which fiat was to pay the travelling fee. But I do not think, that the solicitors are justified in sitting in judgment on the Commissioner. If, indeed, it necessarily followed from the words of the act of parliament, that all acts done by a Commissioner, who had taken improper fees, were, *ipso facto*, void, the solicitor might have been justified in refusing to summon the Commissioner. But the words of the statute do not warrant such a construction. The act is merely directory; and the Lord Chancellor is alone competent to say that the Commissioner has acted improperly, and to remove him for his misconduct. In the present case, the solicitors were acquainted with all the facts, before they issued the fiat; and if they thought that Mr. Scott was not qualified to act as a Commissioner, they should have applied to the Lord Chancellor to prevent his name from being included in the fiat; for the statute is imperative, in compelling the solicitor to summon the Commissioners who are barristers. It has been argued, that *Ex parte Kirby* is decisive of the present case; but there the Lord Chancellor thought, that the two meetings held on the same day, under the same Commissioner, were, under the circumstances of that case, to be considered as one meeting; and he felt himself bound to remove the Commissioner, under the strict words of the act of parliament. But that decision does not authorize the solicitor to take upon himself the propriety of summoning, or not summoning, a Commissioner to whom a fiat is directed. Nor could it ever have been the intent of the legislature to render every thing done by a Commissioner *ipso facto* void, after taking an il-

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legal fee; otherwise, all the proceedings under a fiat might be vitiated, without any judicial inquiry, by something done by the Commissioner under a former fiat.

Sir JOHN CROSS.—It is not disputed, that the solicitors ought to have summoned Mr. *Scott*, unless they can show that he was disqualified from acting as a Commissioner. But how do they show that? By alleging, that he was unwilling to act for the statutable fees, because on a former occasion under another fiat he took, as the solicitors state, an illegal fee. But I cannot agree, that an improper fee taken on a former occasion is sufficient, of itself, to create such a disqualification. The solicitors should at least have asked the Commissioner, if he would attend under the present fiat for 2*l*. One question is, did the Commissioner travel seven miles to the place of meeting; or rather, is it proved that he did not? The Commissioner says, he believes he did. The other side, however, produce an affidavit of a party, who says, that he caused the road to be measured; but he does not say, that he saw it measured, nor that it was the road which the Commissioner travelled. On this ground of accusation, therefore, there is no pretence for maintaining the charge against the Commissioner, that he has taken an illegal fee. The next objection is, that the Commissioner on some former occasion took two travelling fees, when he ought to have taken only one. Whether, or not, the conduct of the Commissioner was in this respect illegal, is not necessarily a question now before the Court. I therefore abstain from giving any opinion on that point. But if it were proved that the Commissioner was wrong in taking two travelling fees, or that he did not travel seven miles, still there is no pretence for say-

ing that he did not act *bonâ fide*. It might possibly have happened, that the Commissioner on a former occasion made an overcharge by mistake; and I am of opinion, that the penalties of the act of parliament do not apply to an error in judgment; otherwise, if a road, after being critically measured, should turn out to be one foot less than seven miles, every thing done under the fiat would be void, and the Commissioner for ever disqualified. I cannot help thinking, that the solicitors have acted somewhat harshly and unfairly towards Mr. *Scott*. They gave him no reason why they did not summon him to the meetings under this fiat; and when he presents a petition here for redress, he finds an objection raised, that he took an improper fee under a previous fiat, which was paid by these solicitors, without any objection taken at the time. It therefore seems to me, that Mr. *Scott* is entitled to what he asks by the prayer of this petition; or, at any rate, to a declaration of the Court that he was entitled to be summoned, and that he ought to be summoned to all the future meetings.

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Sir GEORGE ROSE.—The declaration of the opinion of the Court, and their giving costs against the respondents, will perhaps satisfy the justice of this case. The solicitors are not right in the objection they have urged for not summoning Mr. *Scott*. The 14th section of the 1 & 2 *Will.* 4. c. 56. declares, that certain lists of Commissioners shall be created in the country; and the previous act of 6 *Geo.* 4. c. 16. s. 23. declared, that under any commission executed in the country the Commissioners who were barristers should be entitled to be summoned, in priority to the other Commissioners. Now Mr. *Scott*, being a barrister, is one of the Commissioners

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Scott.

to whom this fiat is directed, and has never been summoned to any of the meetings. The solicitors say, that they are justified in not summoning Mr. *Scott*, because he has taken improper fees under another fiat, and is therefore wholly disqualified from acting as a Commissioner. But it is clear, that a solicitor is not warranted in maintaining this objection for not summoning a Commissioner. It would be a strong proposition to assert, that the solicitor to the fiat can refuse to summon any Commissioner appointed to act as such under an act of parliament, and who is expressly directed to be summoned by an act of parliament. It would be a different proposition to say, that the solicitors might not apply to the Lord Chancellor, to prevent the name of Mr. *Scott* being inserted in another fiat,—that is, supposing the solicitors to be correct in their charge against Mr. *Scott*, of having taken improper fees. Nothing now said by the Court will affect Mr. *Scott's* liability in this respect, if any such liability has been incurred by him. All that the Court now does is, to declare that the reasons given by the solicitors are not sufficient for omitting to summon the Commissioner. If they had any just cause for complaint against the Commissioner for having acted illegally, it was their duty not to have taken out a fiat in which his name was inserted, but to have applied to the Lord Chancellor to direct the fiat to another list.

Mr. *Anderdon* appeared for the assignees, and asked for their costs.

The Court said they might take them out of the estate. But, it appearing that there was no estate, the Court then said they must fall on the solicitors.

The ORDER was, that the petitioner was entitled to be summoned, and that the solicitors should pay to the petitioner the costs of this application, and the costs of the assignees also, if there was no estate.

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Scott.

Ex parte ROBERT SCOTT, Esq.—In the matter of JONES.

Westminster,
January 16,
1838.

THIS was another petition from the same Commissioner against the same solicitors as in the last case, but in a different bankruptcy. The facts however were precisely the same. After the petition had been presented, the solicitors proposed to the petitioner that the Order to be made in this petition should depend upon that made in the preceding one; but the petitioner refused to agree to this proposal, and filed affidavits precisely similar to those used in the former petition, to which affidavits were filed in answer, and in reply, stating exactly the same facts as those stated in the affidavits under the former petition.

Where a petitioner presents two petitions against the same party, involving the same point, and the respondents propose that the decision in one shall bind in the other, the petitioner is not entitled to the costs of any affidavits filed by him in the second petition after such proposal has been made.

Mr. *Bethell*, for the petitioner, applied for a similar Order as in the last case.

Mr. *Swanston*, for the solicitors, consented to the Order; with the exception of allowing the petitioner the costs of the affidavits.

The COURT thought the exception reasonable, and declared that the petitioner should have all his costs up to the time of receiving the proposition from the solicitors, that the decision in the former case should govern this; but no costs beyond that time.

1838.

Westminster,
January 19,
1838.

An equitable mortgagee is entitled to the rents only from the order of sale, notwithstanding he has previously given notice to the tenants not to pay them to the bankrupt.

Ex parte BURRELL.—In the matter of NORMAN.

THIS was the petition of an equitable mortgagee, praying to be allowed the rents of the estate, from the period when he gave the tenants notice not to pay them to the bankrupt. It appeared, that the title deeds were deposited to secure the sum of 2120*l.*; and that in the memorandum accompanying the deposit, the bankrupt agreed to execute a legal mortgage, and in the mean time to stand possessed of the rents and profits in trust for the mortgagee; and that the petitioner had obtained the common order for the sale of the property; which did not produce enough to satisfy the mortgage. The notice given to the tenants was six days after the act of bankruptcy.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition. It has been decided in the case of *Garry v. Sharratt* (a), that where a trader had deposited with his creditor the deeds of an estate to secure the payment of a debt, and the trader afterwards took the benefit of the Insolvent Act, the assignee of the insolvent could not recover, even in an action at law, from the creditor the rent of the estate, which the latter had received subsequently to the discharge of the insolvent debtor. In our case, the petitioner, on the bankruptcy of *Norman*, gave notice to the tenant not to pay the rent to him. [*Erskine*, C. J. I do not think the case of *Garry v. Sharratt* applies to this.] In that case Lord *Tenterden* expressed himself very strongly in favour of the rights of the equitable mortgagee. He says, "At law, *Flowers*

(the insolvent) was entitled to the land; in equity, the defendant, as mortgagee, was entitled to the land, and the rents accruing from it. The assignment to the plaintiff did not give him any right to those rents." When our notice was given, who could be entitled to the rents but the petitioner? In none of the cases where this Court has decided that the mortgagee is only entitled to the rents from the order of sale, has any notice been given by the mortgagee to the tenant. In our case the notice makes an important difference, and renders the case more analogous to that of a legal mortgage. In the cases reported, the question has been between the mortgagee and the assignees. Here it is between the mortgagee and the tenants. Where there is a fund *in medio*, and notice given not to pay it over, the assignees are not entitled. The same principle on which *Garry v. Sharratt* was decided has been acted on in the subsequent case of *Sumpter v. Cooper* (a); where a debtor deposited the title deeds of an estate in the county of Middlesex with his creditor, and afterwards assigned his interest in the same premises to the same party by a deed, which was not registered under the 7 Ann. c. 20: the debtor afterwards became bankrupt; and the assignees having brought an action for the rents received by the mortgagee; it was held, that though the deed of assignment was void, for want of registration, yet the assignees could not recover the rents received by the defendant, which he had a right to retain in his character of equitable mortgagee. It has certainly been reported in one case, *Ex parte Alexander* (b), to have been held by Lord Eldon, that an equitable mortgagee was not entitled to the rents of the mortgaged estate,

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Ex parte
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(a) 2 B. & Adol. 223

(b) 2 G. & J. 275.

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previous to the sale. But that case cannot be depended upon, as Lord *Eldon* is there reported to have delivered a written judgment, stating that an equitable mortgagee, suing in a cause, did not in equity obtain a decree for a sale, but only for foreclosure. This Lord *Eldon* never could have intended; there must have been some misprint or slip of the pen. [Sir *G. Rose*. Certainly there is some mistake in the report on that point.] [*Erskine*, C. J. This Court has, nevertheless, acted on the decision in that case, and has only given the rents to the equitable mortgagee, from the date of the order of sale.]

Mr. *Swinburne*, *contra*, was stopped by the Court.

ERSKINE, C. J.—It is not, because the facts of this case may be somewhat different from those of the cases already decided, that the principle of those decisions is to be affected. The principle is this, that an equitable mortgagee is not entitled to the rents, until his title is declared substantiated by the order of sale; while, in the case of a legal mortgagee, *his* title is complete by the mortgage itself. Then, what difference can the notice make, to found an exception to this general rule, which the Court has always acted upon? A legal mortgagee gives notice to the tenants, because he may then sue them for the rents; but an equitable mortgagee could not thus avail himself of such a notice, for he has no legal right of action. I think the rule is plain and intelligible, and that it is advisable to act upon it, without allowing of minute distinctions.

Sir JOHN CROSS.—I think it is perfectly consistent with general principle, that an equitable mortgagee

should take no rents before the order of sale; and that the notice in this case does not warrant a departure from the general rule.

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Sir G. ROSE.—The petitioner in this case does not stand on his legal title, but comes here for the assistance of the Court, which will be given, according to the well known practice in such cases. This distinguishes the present case from those of *Garry v. Sharratt* and *Sumpter v. Cooper*, which were decisions by a court of law. The right of an equitable mortgagee to the rents and profits depends entirely on the order that the Court may pronounce; and the mortgagor cannot be called to account for the rents he has previously received; the reason of which is, that this Court cannot recognize any right in the equitable mortgagee, until the order of the Court declares him to be such. The proceeding in this Court is analogous to that in a Court of equity; where an equitable mortgagee files a bill in equity, he is only entitled to a receiver, from the time of the answer being filed; so, in bankruptcy, he is only entitled to the rents from the date of the Order.

Petition dismissed.

Ex parte CHARLES MARSON.—In the matter of ROBERT
RIDSDALE.

Westminster,
January 19 &
27, 1838.

THIS petition, which was for the proof of a judgment debt, and which had stood over from a former hear-

Semble, that
Commissioners
may inquire into
the considera-
tion for a judg-

ment debt; *dissentiente*, Sir J. Cross, unless on the ground of fraud.

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Ex parte
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ing (a), in order that the Commissioner might positively reject, or admit, the proof, came on now to be finally disposed of. The Commissioner had admitted the proof; and the question was, whether he had jurisdiction to inquire into the consideration of the debt. The petition alleged, that the promissory note, which was the foundation of the debt for which the judgment was given, was for the amount of money received by the bankrupt for bets on races made on behalf of the petitioner; but the bankrupt alleged, that it was for bets made with the petitioner himself. The judgment was on a cognovit given by the bankrupt on the 22d July 1834, and the judgment was entered up on the 25th July. The fiat was issued on the 28th May 1836.

Mr. *Koe* appeared in support of the petition.

Mr. *Bethell*, *contrâ*. On the petitioner's own showing, the promissory note was given for an illegal transaction. In *Shillito v. Theed* (b) it was held, that the plaintiff, though an indorsee for a valuable consideration, could not recover on a bill given in payment of a bet above 10*l.* on a legal horse-race. The case of *George v. Stanley* (c), also, makes in favour of the principle contended for. It is decided, that one party cannot maintain an action against another, for the produce of a transaction prohibited by law. It follows, that a principal cannot recover from his agent the

(a) See 2 Deac. 245.

(b) 7 Taunt. 405.

(c) 4 Taunt. 683. In this case, however, the Court of Common Pleas refused to set aside a judgment confessed on bills given for the amount of a gaming debt, unless the party could affect the holder of the bills with notice.

amount of money received by him on an illegal transaction.

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ERSKINE, C. J. referred to the case of *Edwards v. Dick(a)*, where it was held, in an action against the drawer of a bill, that it was no defence that the bill was accepted for a gaming debt, if it be indorsed over by the drawer for a valuable consideration to a third person, by whom the action is brought.

Sir JOHN CROSS.—Whether the Commissioners can enter into the consideration of the validity of a judgment duly obtained at law, I am not prepared to give an opinion. I am not satisfied with the case of *Ex parte Butterfill (b)*.

Mr. *Bethell* then applied for time to look into the authorities; and undertook, if the Court would permit the matter to stand over for that purpose, that the argument should proceed on the statement in the petition, that the money was received by the bankrupt on bets made by him, as agent for the petitioner, with other persons.

The COURT accordingly ordered the petition to stand over.

Mr. *Bethell* now said, that having considered the facts of the case with great attention, he thought the assignees ought to abandon their opposition to the proof of the debt. January 27.

Sir JOHN CROSS then delivered the following judg-

(a) 4 B. & Ald. 212.

(b) 1 Rose, 192.

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ment:—I observe in the printed reports of a former discussion of this case, it has gone forth to the public, that it is held in this Court that it is as competent for Commissioners to enquire into the consideration of judgments, as of bills of exchange. As I am not aware of any such general rule, I feel it incumbent upon me to express my opinion on that subject. I had always before understood, that there was this established distinction; that though a simple contract is only *prima facie* evidence of a debt, a judgment is conclusive; and that it is a first principle of English jurisprudence, that the merits of a judgment of a Court of competent jurisdiction can never be tried over again, or disputed in any shape whatever, either by the parties themselves, or by those who claim under them. It is true, that Courts of Equity may deal with the rights of parties founded on a judgment, as well as with any other rights of property. But the merits of the judgment are taken as *res judicata*, and not to be disputed by any matter of fact cognizable by the Court where such judgment stands recorded. It is stated as a general principle in Comyn's Digest, title Chancery Judgment, that Chancery cannot proceed by suit in equity to annul a judgment at common law, nor to examine the justice of a judgment given. If then it be not competent for any Court of Law or Equity to try over again *res judicata*, I cannot understand by what authority Commissioners can do this, who, although for some purposes they may be considered a Court, have no judicial authority to hear and determine any matter whatever, either of law or equity. Two cases have been referred to, as authorising Commissioners to revise the merits of a judgment, namely, *Butterfill's case* (a), and *Bryant's case* (b). But the former appears to me to

(a) 1 Rose, 192.

(b) 1 Ves. & Bea. 211.

show the contrary. There a creditor tendered a proof founded solely on a verdict, and the Commissioners rejected the proof, because the verdict of the jury had not been affirmed by the judgment of the Court, nor was the consideration shown. Lord *Eldon* held they had done rightly, and said, "It is competent for any party to impeach the verdict; before it is matured into a judgment, it is only *primâ facie* evidence of a debt." As to *Bryant's* case, the question there was, whether there was a good petitioning creditor's debt; the objection being, that although there was a sufficient debt prior to the bankruptcy, it was merged in a subsequent judgment. Upon that Lord *Eldon* was of opinion, that the original debt was not merged, and that the consideration for the judgment must be looked to, not for the purpose of defeating it, but for the purpose of supporting the commission, which was the only point to be determined. But the reporter has ascribed to the Lord Chancellor a single word, which turns the expression of his opinion of the case before him into the assertion of a general rule. The words of the report run thus,—“Proof upon a judgment will not stand merely upon that, if there is not a debt due in truth and reality, for which the consideration must be looked to.” But if the indefinite article in that sentence be changed, and it be read “Proof upon *the* judgment,” then the opinion would be confined to the case judicially before him, instead of promulgating a general rule, not at all necessary to the determination of that case. And this is the only trace I have been able to discover in support of the alleged general rule. If there had been already any such general rule, the subsequent act, 3 *Geo.* 4. c. 39., which makes certain judgments therein described void in case of bankruptcy,

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is an absolute nullity; for it seems to me, that enquiring into the consideration of a judgment is to treat it as null and void, inasmuch as all specialty debts are payable in bankruptcy *pari passu*, and without priority, and therefore the only use of a judgment is in being conclusive evidence of a debt. I am therefore of opinion, that it was not the duty of these Commissioners to enquire into the consideration for the judgment in question, unless they had previously found that the *cognovit* was not filed pursuant to the statute, which in that case makes it fraudulent and void as against assignees. And I think, that this Court is bound to admit the judgment as conclusive evidence of the debt, unless it be so vacated by the statute. The case of *George v. Stanley* (a) has been cited, as an instance of a trial on the merits after judgment. But there, the judgment being against the loser of money at play, it was altogether void by the statutes against gaming, though that reason is not adverted to in the report. It does not, however, appear to me, that any of those acts are applicable to the judgment now before us, nor do we find that the validity of it has been at all questioned on any grounds either of illegality, or fraud, or irregularity, but on the testimony of witnesses to the merits; which I do not think it was within the province of the Commissioners to try, after those merits had been, in the words of Lord *Eldon*, matured into a judgment.

ERSKINE, C. J.—Not supposing it would be necessary, I have not looked into the authorities on this subject; but I confess my opinion has not been altered by what has just been said. I have a strong impression on my mind, that there are many cases where the Lord Chan-

(a) 4 Taunt. 683.

cellor has referred it to the Commissioners to enquire and report, as to the consideration for judgment debts. If the Commissioners were prevented from instituting such an enquiry, it would often happen that *bonâ fide* creditors would be defrauded; as all usurious and gaming debts would be secured by judgment.

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Sir JOHN CROSS.—All fraudulent judgments can, of course, be examined into, when any ground is laid.

Sir GEORGE ROSE.—As the point has not been argued by the counsel for the respondents, I am not called upon to express any opinion on it; still it is important to be understood, that the Commissioners have authority to examine into the consideration of a judgment debt. There is a distinction between the operation of judgments on property, when the party continues solvent, and when bankruptcy intervenes. Execution on a judgment is frequently stayed and set aside on equitable grounds, both at law, and in equity; and by analogy, the same is done, in effect, in bankruptcy, by preventing a proof on the judgment.

Ex parte JOHN THORPE.—In the matter of JOHN TEASDALE, and JOHN ATKINSON SWALES.

Westminster,
Jan. 20, 1838.

THIS was a petition to confirm the certificate of the Commissioners, to whom it had been referred to inquire as to the deposits of deeds under an equitable mortgage.

Although an order for the sale of an equitable mortgage is accompanied by an order of

reference to the Commissioners, to ascertain the time of the deposit of the deeds, yet if the certificate of the Commissioners agrees with the statement of the equitable mortgagee, he is entitled to the rents accruing from the date of the order.

Where some deposits of deeds are made with written memoranda, and others without, the costs will be apportioned, and only those allowed, which relate to the deposits accompanied with memoranda.

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The petitioner was the managing director, and one of the public officers, of a joint stock banking company called "The Northern and Central Bank of England." On the 29th September 1836 the petitioner presented a petition to this Court, stating that the bankrupts on the 2d January 1836 opened an account with this bank, and that, in order to secure the payment of any balance that might become due from them, they deposited at various times with the bank several leases of property at Sheffield.

On the 21st September 1836 a fiat issued against the bankrupts, when there was due from them to the bank a balance of 555*l.* 1*s.* 4*d.*, and also a further sum of 531*l.* 12*s.* 11*d.* upon bills of exchange drawn by the bankrupts and discounted by the bank. The petitioner prayed for the usual order for the sale of the leasehold property comprised in the deeds, and that he might be permitted to prove for the remainder of the debt, which the proceeds of the sale might not be sufficient to liquidate. On the hearing of the petition, which did not specify the precise times when the deeds were deposited, the Court made the usual Order for the sale of the property, but directed that the proceeds, after payment of the expenses of the sale, should be paid into the Bank of England, with the privity of the accountant in bankruptcy, subject to further order; and it was ordered, that it should be referred to the Commissioners, to inquire and certify to the Court at what time the deposit of the several deeds by memorandum, or otherwise, took place; with liberty for the Commissioners to state special circumstances, and reserving further directions and costs.

On the 3d March 1837 the Commissioners made their report, by which they certified that two leases were deposited with the banking company on the 2d January

1836, and that a memorandum stating the object of the deposit was at the same time signed by the bankrupts; that another lease was deposited with the bank on the 19th April 1836, and another lease on the 26th April 1836; and that another lease, together with two indentures of mortgage and assignment, were deposited before the 18th May then last; and that the three last deposits were made without any accompanying memorandum.

The memorandum which accompanied the deposit of the two first-mentioned leases declared, that they should remain in the hands of the directors of the bank for the time being, as a security to the company and the proprietors constituting the same for the time being, as a changing and fluctuating body, for the payment of all monies, which then were, or which should thereafter become, due and owing from, or be chargeable to, the bankrupts from time to time, to or on the account of the bank, by reason of any advances from time to time made by the bank to the bankrupts.

The premises comprised in the several indentures of lease were sold by auction before the Commissioners on the 14th April 1837. The purchase monies for those in the two first-mentioned leases amounted to 2161*l.*—and the purchase monies for all the other premises to 1004*l.*; and the clear produce of the sales received by the assignees, after deducting the expenses of the sale, amounted to 2960*l.*

The petition alleged, that the assignees had since the date of the Order for sale received considerable sums, in respect of the rents and profits of the premises comprised in the several indentures of lease, and that such sums were then in their hands. That in addition to the sums of 5556*l.* and 5313*l.*, due from the bankrupts to the

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bank, there was also due the sum of 11,128*l.*, in respect of bills of exchange drawn by the bankrupts and discounted by the bank, making together 21,999*l.*; and that a meeting for a dividend was advertised for the 6th December next.

The prayer was, that the certificate of the Commissioners might be confirmed, and the petitioner be paid his costs of the former petition and of all subsequent proceedings out of the sum of 2960*l.*, and that the residue of that sum might be also paid to the petitioner; and that it might be declared, that the bank was also entitled to be paid all the rents and profits received by the assignees since the date of the Order for sale; and that the petitioner might prove for the residue of the debt due to the bank.

Mr. *Swanston*, and Mr. *Abraham*, appeared in support of the petition.

Mr. *Walker, contra*. The Court has departed from its usual course in this instance, by making the order for sale, before the petitioner had established his title as equitable mortgagee. It was considered for the benefit of all parties, that the property should be realized; but the Court did not, on the former occasion, make a positive order in favour of the petitioner as equitable mortgagee. Besides, part of the rents now claimed became due before the order was made, and only part afterwards. [*Erskine, C. J.* The Court on the former occasion entertained a doubt, that the deeds were not deposited at the times alleged by the petitioner, and referred it to the Commissioners to ascertain that fact; which having been now ascertained, ought not the petitioner to have the

same benefit, as if the Court had made an absolute order of sale?]

One of the leases in this case the bankrupt was entitled to, as assignee; and although this lease was deposited by the bankrupt with the petitioner, yet the assignment of the lease was never deposited with him; and if a party has not the deed which gives the bankrupt an interest in the property, the Court has never decided that a deposit of any other deed relating to the property will amount to an equitable mortgage. In *Ex parte Pearse* (a), where the bankrupt had deposited the title deeds of an estate with *A.*, and the immediate conveyance to himself with *B.*, it was held by Lord *Eldon*, that *A.* and *B.* had not either separately, or collectively, a good equitable mortgage. But there is another point in the case. The deeds were deposited by only one partner. Now, as one partner only cannot execute a legal mortgage of property belonging to the firm, it follows, that he is equally incapacitated to make an equitable mortgage. [*Erskine*, C. J. The deeds were deposited with the bank for money lent to the firm; and the partner, therefore, who made the deposit, must be implied to be authorized as the agent of the other.] Then as to the material question, the right to receive the rents,—the principle, on which the Court directs the rents to be paid to an equitable mortgagee is, that his title is completed, only, from the time of the declaration of the Court in his favour. This petitioner did not, on the former occasion, pray for the receipt of the rents and profits; and a party, to be entitled to these, is bound to put himself, either actually, or virtually, into possession of the property. In cases of equitable mortgage the Court of Chancery does not allow the rents, till the appointment

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(a) Buck, 525.

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of a receiver. Finally, in regard to the costs,—the petitioner is not entitled to costs, as part of the deeds were deposited, without any written memorandum.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The former order included a reference to the Commissioners, for the purpose of ascertaining the times of the several deposits, to see whether the petitioner was correct, in stating that they were made before the act of bankruptcy. Now, as the certificate of the Commissioners agrees with the statement of the petitioner in this respect, the petitioner ought now to stand in the same situation, as if the Court had acted on his statement at the former hearing, and had made the common order at once. I think, therefore, that he is entitled to the rents which have accrued since the date of the former order, and before the sale of the property. The effect of the former order was to make the assignees receivers, or trustees, of the rents for the party really entitled to them. From the time when the Court takes the property into its own hands, the rent follows the title to the property; just as the appointment of a receiver would give the rents to the equitable mortgagee. With respect to the objection that has been urged to the deposit of one of the leases, without the assignment to the bankrupt, I think that as the original title-deed, which is the essential deed, was deposited with the petitioner, this is enough to constitute a good equitable mortgage; for it evidently shows what the intention of the party was, in making such deposit. In regard to the costs, as it appears that some of the deposits were accompanied by memoranda, and others not,

I think the costs should be apportioned ; and that, as to that part of the property where there was a written memorandum, the costs should come out of the proceeds of the sale ; and that, as to that part where there was no written memorandum, the costs should be paid by the petitioner.

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The ORDER was, that the petitioner should be declared equitable mortgagee, and entitled to the rents from the date of the former order, and that an account should be taken of them by the Commissioners: that the costs should be apportioned, in respect of the deposits without, and of the deposits with, a written memorandum: and that the petitioner should be permitted to prove for the residue of the debt.

Ex parte BROWN and others.—In the matter of
WARWICK and CLAGETT.

THIS was the petition of *Brown & Co.*, on behalf of themselves and other bill-holders, claiming a lien on certain shares in the Bank of the United States of America, the certificates of which were in the hands of the official assignees, under the following circumstances :

The bankrupts entered into an agreement with *Jackson Riddle & Co.* of Philadelphia, to purchase, on a

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An agreement was entered into between a firm in England, and another in America, that the latter should purchase American Bank shares, and remit them to the English house for sale, drawing bills on

the English house for the amount of the purchase-money, and that the proceeds of the sale of the shares should be applied by the English house in payment of the bills. Various bills were drawn by the American on the English house, and were negotiated by the former. Both houses became bankrupt; and the certificates of the bank shares did not arrive in England, until after the bankruptcy of the English house, when they got into possession of the assignees. Held, that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills, and that the shares were not within the operation of the clause of reputed ownership.

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joint speculation, shares in the Bank of the United States. It was arranged, that *Jackson Riddle & Co.* were to purchase the shares with their own money, and were to draw bills on the bankrupts for the amount of the purchase-money, which the bankrupts undertook to honour, and which *Jackson & Co.* were afterwards to negotiate in America, and apply the produce in repayment of the money they had advanced. On the 25th February 1837, *Jackson Riddle & Co.*, in pursuance of this agreement, purchased 350 shares for 9374*l.*; for which sum they drew nine bills on the bankrupts, and negotiated them in America. The certificates of the shares were transmitted to England, for the purpose of being sold by *Warwick & Clagett*, who were to apply the proceeds in the discharge of their acceptances; but before the certificates arrived, *Warwick and Clagett*, on the 12th May 1837, became bankrupts. The certificates consequently came into the hands of their assignees, who claimed a right to retain them. The bills, which were drawn and negotiated before the bankruptcy, were due, and remained unpaid.

On the 28th February 1837, Messrs. *Jackson Riddle & Co.* wrote to *Warwick & Clagett* as follows: "We purchased on the 28th inst., for our joint account, 350 shares United States Bank, at 118½, which we will remit and draw for per next packet. We should have drawn against the same this day, but expect that bills will command a better price per next packet. The certificates could not be got ready for transmission by this opportunity."

On the 7th March 1837, *Jackson Riddle & Co.* wrote as follows to *Warwick & Clagett*: "Inclosed we hand seven certificates, each for 50 shares United States Bank,

Nos. 4027 to 4033 inclusive, being the 350 shares purchased the 28th ult., for joint account with your good selves. Against the purchase of 350 bank shares we have drawn our bills Nos. 147 to 150, amounting to 3100*l.*; the residue we will value for by next packet."

On the 15th March 1837, *Jackson & Co.* wrote as follows: "Prefixed we hand statement of the bank shares remitted the 7th instant, closed by our bill of the 11th instant, at sixty days, 4535*l.*, which we trust will prove correct and satisfactory."

In addition to these shares, *Jackson Riddle & Co.* had also previously purchased, on the like joint speculation, 200 other shares in the United States Bank, and had in like manner drawn bills on the bankrupts for the amount of the purchase-money. Of these shares the bankrupts had sold 150, and had applied the proceeds in payment of all the bills but one, leaving a balance of 79*l.*, which came into the hands of the assignees, together with the remaining 50 shares. The bill unpaid was for 1249*l.*, which had been discounted by the petitioners, and was then in their hands. The 150 shares were in the name of *Warwick* alone. *Jackson Riddle & Co.* afterwards became bankrupt.

At the time of the bankruptcy of *Warwick & Clagett*, two of the first-mentioned bills, one for 500*l.*, and another for 4535*l.*, were in the hands of two other parties, who had paid full consideration for them, deducting the discount.

The prayer was, that the official assignee might deliver to the petitioners the 350 share certificates, to be sold and applied in payment of the respective bills drawn against the same, in proportion to the amount of such bills, or that the official assignee might sell the shares

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and apply the proceeds in like manner; and a similar order was prayed with respect to the 79*l*. and the 50 shares, for the liquidation of the bill for 1249*l*.

Mr. *J. Russell*, in support of the petition, referred to the cases of *Ex parte Waring* (a), *Ex parte Prescott* (b), and *Ex parte Hobhouse* (c). The correspondence proves, that the parties expressly agreed that the proceeds of the shares were to be applied in payment of the bills; the bankrupts were bound to fulfill this agreement; and the assignees, therefore, cannot retain the shares, or their proceeds, without applying them to the specific purpose for which they were remitted to *Warwick & Clagett*. If *A. & B.* purchase goods on a joint speculation, and *A.* become bankrupt before the goods are paid for; it is clear, that *A.*'s assignees cannot claim their share of the goods, or their proceeds, until the price is paid; when, and not before, the profit or loss may be shared between them. In the present case, the shares are purchased on a joint adventure; and the amount of the bills drawn by *Jackson & Co.* on *Warwick & Clagett* constitute the price, which the assignees of the latter firm are bound to pay, before they can derive any benefit from the shares.

Mr. *Burge*, for the assignees of *Jackson Riddle & Co.*, consented to the prayer of the petition, provided they were indemnified from all expense, and the petitioners would agree not to attempt to prove the bill against either estate.

(a) 2 Rose, 182.

(c) 2 Deac. 291.

(b) 3 Deac. & C. 218.

Mr. *Swanston*, for the assignees of *Warwick & Clagett*. These shares are the partnership property of the two firms in England and America; and although, as between the partners, there is a lien on the proceeds of the shares for the discharge of the bills, yet this lien does not extend to the holders of the bills. The present case is distinguishable from *Ex parte Waring*; for, in that case, there was an express contract that the fund should be liable for payment of the bills. Here there is no contract, but merely a proposal from *Jackson & Co.*, which, for any thing that appears to the contrary, was never acceded to by *Warwick & Clagett*. The shares were therefore in the reputed ownership of *Warwick & Clagett*. No one but *Warwick* had any knowledge that *Jackson & Co.* had any lien upon the shares; and therefore the shares passed to *Warwick & Clagett's* assignees; *Ex parte Chuck* (a), and *Ex parte Burbridge* (b).

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ERSKINE, C. J.—The course, which the petitioners propose to take, appears to me the most beneficial to all parties, provided they have a right to what they ask by this petition; and I am clearly of opinion, that they have such right. The letters of *Jackson & Co.* do not exactly constitute the contract; but they are evidence of its existence. It is impossible to read the letter of the 28th February, without arriving at the conclusion, that it refers to some contract previously entered into between the parties; and the petition states, as a fact, that *Jackson & Co.* did enter into an agreement with *Warwick & Clagett*, for the purchase and subsequent disposal of these shares, on the joint account of the two firms. It

(a) Mont. 457.

(b) 1 Deac. 131.

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does not appear to me material, whether or not there existed, strictly speaking, an agreement for a partnership as to these shares; for there can be no doubt of an agreement to share profit or loss, and therefore they must be taken to be so far partners. On the part of *Warwick & Clagett* it was stipulated, that they would hold the shares as the joint property of themselves and of *Jackson & Co.*, subject to the payment of the bills out of the proceeds; and therefore *Jackson & Co.* have a right to insist on the proceeds being so applied. It is on this stipulation the bill holders found their petition, and not upon any right of lien. It appears to me, therefore, that on the principle of *Ex parte Copeland*(a), and *Ex parte Prescott*(b), the proceeds of the shares ought to be applied in payment of the bills. It has not been stated, whether there are any joint creditors of the two firms; but if there are any, their rights must be provided for, as in the cases I have just cited. It has been contended, that these shares must be considered to have been in the reputed ownership of *Warwick & Clagett*, under the 6 Geo. 4. c. 16. s. 72.; but I do not think that section applies to this case. The bills were transmitted to *Warwick & Clagett* clothed with a trust, namely, to retire the bills; and therefore the case is not within the provisions of reputed ownership. In support of this position I may even cite *Ex parte Burbridge*(c); for in that case the Lords Commissioners laid great stress upon the trust being a secret trust, for the benefit solely of one individual; whereas here the trust was not intended to be secret; and it was created for the benefit, not of one individual, but of several individuals in partnership under two different firms.

(a) 3 Deac. & C. 199.

(b) Id. 218.

(c) 1 Deac. 131.

Sir JOHN CROSS concurred.

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Sir GEORGE ROSE.—The claim of the petitioners in this case depends upon the equities subsisting between the two sets of assignees of *Warwick & Clagett*, and *Jackson Riddle & Co.* The assignees of *Jackson & Co.* may insist that the funds in question shall not be touched by the assignees of *Warwick & Clagett*, until they relieve the estate of the American firm from the bills for which that estate is liable. With regard to the question of order and disposition, the objection on that ground comes with a very ill grace from the assignees, who have the proceeds of these bills in their hands. In order to have sustained that objection, they ought to have proved the time of the act of bankruptcy, which they have omitted to do. It is in evidence, however, that *Warwick* had suspended payment long before the bankruptcy, on which occasion an inspector was appointed of his estate and effects; so that the shares could not be in *Warwick's* order and disposition.

The ORDER was, that distinct accounts should be taken of the property; that the property should be realized, and the expenses paid, the petitioners undertaking, in respect of the bills they held, to indemnify the estate; that the net proceeds from the sale of the shares should constitute a fund for the benefit of the bill-holders, in rateable proportions, they undertaking to release the two estates from any claims on the bills; and that the costs of the petitioners, and the American firm, as well as those of the assignees, should

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come out of the funds, provided the assignees did not go further into the question of order and disposition; but if they did, their costs were then to come out of their own estate.

Ex parte BELCHER.—In a cause of BANNATYNE and others v. LEADER.

Westminster,
Jan. 25 and 27,
1838, coram
Ld. Chancellor.

At a meeting of creditors to decide on referring disputes to arbitration, and commencing suits in equity, a creditor may consent by proxy, under the 6 Geo. 4. c. 16. s. 88.

THIS was an application of an official assignee, that his name might be struck out of the bill filed in the above cause, under the following circumstances. The suit was instituted by the assignees of a bankrupt; and before it was commenced, a meeting of creditors was duly held under the provisions of the 6 Geo. 4. c. 16. s. 88., at which some of the creditors who resided in Scotland voted by proxy. A question then arose, whether the due consent of creditors had been given according to the requisition of the statute, so as to entitle the assignees to their costs out of the bankrupt's estate, in the event of the suit being unsuccessful. The official assignee was apprehensive, that the requisite consent of the creditors had not been given according to the terms of the statute, and that he might be personally liable to the costs of the suit; and, on this ground, he made the present application to the Court.

Mr. *J. Russell*, in support of the motion. The statute intended that the creditors should be personally present at the meeting, in order that they might hear and consider the arguments in favour of the proposed suit; and

therefore the consent to the institution of the suit is not valid, when given by proxy. The consequence will be, that if the bill should be dismissed with costs, the assignees would not be entitled to retain the costs out of the bankrupt's estate. The words of the 88th section are, "with the consent of the major part in value of the creditors who shall have proved under the commission, *present* at any meeting, whereof, and of the purport whereof, twenty-one days' notice shall have been given in the London Gazette."

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Mr. *G. Richards, contra*. The act of 6 Geo. 4. c. 16. allows the consent of a creditor to be given by proxy in various matters, quite as important as that of instituting a suit in Chancery. Thus, by section 46, an agent may prove a debt due to a corporation. By section 61 a creditor may depute another person by letter of attorney, to vote in his behalf in the choice of assignees. By section 124, a creditor may authorize another person to sign the bankrupt's certificate. And by section 134, where a creditor resides out of England, any person authorized by letter of attorney may vote in his behalf at a meeting to decide upon a composition. It is plain, therefore, that a consent, in this instance, by proxy is within the meaning of the statute.

Cur. adv. vult.

Lord COTTENHAM, C., now delivered judgment as follows.—The question in this case arose upon the construction of the 88th section of the Bankrupt Act. It is there enacted, that the assignees, with the consent of the

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major part in value of the creditors who shall have proved under the commission, present at any meeting, of which twenty-one days' notice shall have been given in the Gazette, may compound with any debtor to the bankrupt's estate, or may submit any dispute to arbitration; and then the section declares, that "no suit in equity shall be commenced by the assignees, without such consent as aforesaid." It has been objected by the present applicant, that, under this section, the consent of a creditor to the commencing of a suit is invalid, if given by proxy. But it appears to me, that a consent of a creditor, given through his authorized agent, is sufficient; otherwise the intent of the act would be defeated; as a minority of creditors, who happened to be present at the meeting, might have complete control over an absent majority. It does not appear, that this delegated authority is excluded in any case by the act; and the 124th section provides, that even the bankrupt's certificate may be signed by an authorized agent of the creditor. The official assignee has, therefore, a sufficient consent of creditors to the institution of this suit, to enable him to prosecute it with perfect safety as to costs.



Ex parte DANIEL MEINERTZHAGEN and others.—In the matter of WILLIAM SIDNEY WARWICK and THOMAS WILLIAM CLAGETT.

1838.

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Westminster.  
Jan. 29, 1838.

THIS was a petition of the assignees to expunge a proof made against the separate estate of the bankrupt *Warwick*, under the following circumstances.

*Warwick*, having for several years carried on the business of a commission merchant, on the 1st October 1836 formed a copartnership with *Clagett*, for the purpose of continuing the same business. During the separate trading of *Warwick*, *John Hagan* of New Orleans in America, some time before September 1836, deposited with him bonds of the State of Virginia for 50,000 dollars. *Hagan* in the same year entered into partnership with *James Magee* of Liverpool. In September 1836 *Hagan* applied to *Warwick* to grant him a credit for 10,000*l.* upon the security of the Virginian bonds, which *Warwick* agreed to do by the following letter, dated September 21st 1836.

“In consequence of your having deposited in my hands 50,000 dollars of Virginia State 5 per cent. bonds, I hereby open a credit in your favour for 10,000*l.*, to the extent of which the drafts of yourself, or any one authorized by you, shall meet due honour. The above stocks are of course held subject to your order.”

On the 26th September 1836, *Hagan* sent *Warwick* the following letter :—“I hereby transfer your credit of the 21st instant in my favour for 10,000*l.*, issued on a

*H.* deposits with *W.*, his agent, Virginia bonds for 50,000 dollars, which *W.* in July 1836 pledged with a third person, as a security for his own debt. In September 1836 *H.* applies to *W.* to grant him a credit for 10,000*l.* on the security of the Virginian bonds, which *W.* agrees to do, but says nothing about having previously pledged them for his own purposes. On the 1st October 1836 *H.* draws bills on *W.* to the amount of 10,000*l.*, which are accepted by *W. & C.*—*W.* having taken *C.* into partnership on the very day the bills were drawn—and the bills are duly paid by *W. & C.* at maturity, *H.* (at the request of *W. & C.*) remitting 7000*l.* towards the payment of

them. Subsequent dealings take place between *H.* and *W. & C.*, until the latter stop payment; when they make a balance to be due to them from *H.*, but take no notice of the Virginian bonds, the chief part of which had been already redeemed by *W. & C.* and pledged again with another person for a partnership debt from *W. & C.* Held, that the subsequent dealings of *H.* with the partnership of *W. & C.* did not deprive him of his right to prove the amount of the bonds against the separate estate of *W.*

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deposit of Virginia bonds, to *Hagan Magee & Co.*, and beg you will authorize these, valuation accordingly." This letter was accompanied by one from *Hagan Magee & Co.* to the following effect:—"The annexed is a transfer from your good self to our Mr. *Hagan* in our favour, which we pray you to notice. We may require to use this for some operations here through this week; but we pray you to observe, we will draw on you at sixty or seventy days, previous to which time we shall place you in funds for amount of such valuations, as to create with you no cash advance."

On the 28th September 1836, *Warwick* wrote to *Hagan Magee & Co.*, acknowledging the order to transfer the credit on the bonds, saying: "Your valuations against the same, at any date most agreeable to yourselves, shall meet due honour. I note, that it is not your intention to place me in cash advance, on account of any valuations you may so make; but I beg, upon this point as well as every other, you may command me in any way I can be most serviceable to you."

On the 1st October 1836, *Hagan Magee & Co.*, in pursuance of this arrangement, drew three bills on *Warwick*, payable at three months, for 10,000*l.*; which bills were accepted by the new firm of *Warwick & Clagett*; the partnership between these two latter persons having commenced on the very day the bills were drawn, which fact was announced by a letter of that date from *Warwick & Clagett* to *Hagan Magee & Co.*; and on the 3d October *Warwick & Clagett* wrote another letter to them, saying, that the bills should receive due honour. The bills were accordingly accepted by *Warwick & Clagett*, and duly paid by them at maturity.

*Hagan* was at this time at Liverpool, and consented



to the above arrangement, and requested that the balance of his account with *Warwick* might be transferred to the account of *Hagan Magee & Co.* with *Warwick & Clagett*, which was accordingly done; and the future account was kept between those two firms. On such transfer of accounts, *Warwick & Clagett* debited themselves with 2140*l.* 7*s.* 10*d.*, as due from *Warwick* to *Hagan*, and took credit for two sums of 140*l.* as due from *Hagan* to *Warwick*; which statement of account was agreed to by *Hagan Magee & Co.* From this period there were no separate dealings between *Warwick* and *Hagan*.

On the 12th December 1836, previous to the three bills for 10,000*l.* falling due, *Hagan Magee & Co.*, having then made no provision for the payment of them, proposed to *Warwick & Clagett* to raise money for that purpose on the Virginia bonds; in answer to which proposal *Warwick* wrote to *Hagan*, saying, that he had hoped that *Hagan* would not have called upon him for the whole amount of the bills at that season, and that if *Hagan* could assist him without inconvenience to himself, he should feel obliged. In consequence of this request, *Hagan Magee & Co.* on the 31st December 1836 remitted to *Warwick & Clagett* 7000*l.*, towards the payment of the bills for 10,000*l.*; all of which were duly paid by *Warwick & Clagett* at maturity.

The Virginia bonds had, in fact, as far back as July 1836, been pledged by *Warwick* to *Overend Gurney & Co.*, as a security for money borrowed by him for his own purposes. On the 21st September 1836 a balance of 24,580*l.* was found to be due from *Warwick* to *Overend Gurney & Co.*, for which they held these bonds and various other securities. On the 12th December 1836

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*Warwick* paid off 8000*l.* of this balance, by a draft of *Warwick & Clagett* on their bankers, and *Warwick* then took up from *Overend Gurney & Co.* part of the bonds amounting to 40,000 dollars.

On the 24th December 1836 an arrangement was come to between *Warwick & Clagett* and *Overend Gurney & Co.*, as to the balance due to the latter firm from *Warwick*, amounting to 16,580*l.*; which sum it was agreed should be considered as a loan to *Warwick & Clagett*, and for which *Warwick & Clagett* accordingly gave *Overend Gurney & Co.* their promissory note payable at three months; the remainder of the Virginia bonds for 10,000 dollars being allowed to remain with *Overend Gurney & Co.*, as part of the security for this sum.

On the 5th November 1836 *Thompson Foreman & Co.* were creditors of *Warwick & Clagett*, on their joint promissory note for 10,000*l.* payable at three months, for the payment of which *Thompson Foreman & Co.* held as a security 300 Mechanic and Trades Bank shares, and 300 United States Bank shares. On the 12th December 1836 *Warwick & Co.* prevailed on *Thompson Foreman & Co.* to give up the United States Bank shares, and take instead the Virginian bonds for 40,000 dollars, as a security. On the 8th February 1837 *Thompson Foreman & Co.* sold the bonds and applied the proceeds, amounting to 7176*l.* 19*s.* 6*d.*, in part payment of the note.

On the 8th February 1837 *Warwick & Clagett* suspended their payments, but they continued to carry on their business until their bankruptcy. They shortly afterwards sent *Hagan Magee & Co.* a statement of the account between them, by which they made a balance of 3439*l.* 6*s.* 6*d.* due to them from *Hagan Magee & Co.*; but in this account no notice was taken of the Virginia

bonds for 50,000 dollars. They however informed *Hagan Magee & Co.*, that the bonds had been pledged. On the 28th February *Hagan Magee & Co.* wrote to *Warwick & Clagett*, complaining of this omission in the account; when the latter assured them that they always considered the Virginia bonds as applicable to their account, and that *Hagan Magee & Co.* were creditors upon the estate of *Warwick & Clagett* for the difference between the amount of the bonds and the balance on the account.

On the 27th March 1837, *Warwick & Clagett's* promissory note to *Overend Gurney & Co.* for 16,580*l.* became due; when *Hagan* paid them 2025*l.*, in order to redeem the remainder of the Virginia bonds in their hands, which had been pledged with them by *Warwick*.

On the 12th May 1837 a fiat was issued against *Warwick & Clagett*, under which they were duly found bankrupts, and the petitioners chosen the assignees; when *Hagan* applied to prove against the separate estate of *Warwick* for the sum of 9201*l.* 19*s.* 6*d.*, being the amount of the net proceeds of the Virginia bonds for 40,000 dollars, sold by *Thompson Foreman & Co.*, and of the amount paid by him to redeem the bonds for 10,000 dollars from *Overend Gurney & Co.*

The proof was resisted by the assignees, on the ground that the bonds had, from the time of the acceptance of the bills for 10,000*l.*, been deposited with *Warwick & Clagett*, as a security, and that the proceeds of the bonds had been applied to the use of *Warwick & Clagett*; and that the amount of such proceeds, only, formed an item of account between *Hagan Magee & Co.* and *Warwick & Clagett*, until all monies due to the latter firm in respect of their acceptance of the bills were fully paid;

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and that the only proof that could be made, either by *Hagan* himself, or by *Hagan Magee & Co.*, was against the joint estate of *Warwick & Clagett* for the difference.

The right of proof by *Hagan* against *Warwick's* separate estate was contended for, on the ground that *Hagan* had originally deposited the bonds with *Warwick*, who by his letter of the 21st September 1836 had undertaken to hold the same, subject to the order of *Hagan*; and that the bonds were to be considered as having been all along in the separate custody of *Warwick*, and not as in the custody and disposition of *Warwick & Clagett*, or as deposited with them by way of security.

The Commissioner admitted the proof.

*Mr. Maule*, and *Mr. J. Russell*, in support of the petition. When *Clagett* was taken into partnership with *Warwick*, the previous treaties, which had been entered into between *Warwick* and *Hagan*, became those of *Warwick & Clagett*. It is immaterial, whether an individual partner knows any thing of the partnership transactions or not, in order to render him jointly liable for the acts of his copartner. It was agreed, that the balance due from *Warwick* to *Hagan* should be transferred to *Warwick & Clagett*, and that after the 1st October all future transactions should be considered as transactions and liabilities of *Warwick & Clagett*, and not of *Warwick* alone. [*Sir G. Rose*. Do not the facts of the case show, that the petitioners have a right to elect, whether they will prove against the separate, or joint, estate? What state of things has occurred to discharge *Warwick* from his separate liability, in pledging these bonds for his own purposes?] Assuming that he had done so before the partnership between *Warwick &*

*Clagett*, yet after the petitioners had notice of the partnership, and the balance of *Hagan's* account with *Warwick* had, pursuant to his request, been transferred to the joint account of *Warwick & Clagett*, the previous liability of *Warwick* became merged in the joint liability of *Warwick & Clagett*. [*Erskine*, C. J. It is quite clear, from the correspondence between the parties, that *Warwick*, up to the time of pledging the bonds to *Overend & Co.*, held them subject to the orders of *Hagan*.] Assuming that *Warwick* had done something with the bonds, which he could not lawfully do, *Hagan* might have brought an action of trover for the bonds; and after the sale of the bonds, then an action for money had and received for the amount of the proceeds of the sale; but in that case he would of course have affirmed the sale. It cannot be denied, that these bonds were intended to be a security for all sums drawn by *Hagan & Co.* on *Warwick & Clagett*. The correspondence plainly shows, that *Hagan & Co.* considered the bonds to be in the possession of *Warwick & Clagett*, for they are distinctly treated by them as in the hands of *Warwick & Clagett*; and in December *Warwick & Clagett* had the complete control of the bonds. [*Erskine*, C. J. Not quite so; for *Overend & Co.* had a claim on them for 10,000 dollars.] *Hagan* pays off that debt, and affirms the transaction, as one of *Warwick & Clagett*; and he cannot now place himself in a different situation from what he was then entitled to be in. It was only at the time of the bankruptcy, not on the 12th July, that *Hagan* could claim the proceeds of the bonds from *Warwick & Clagett*. It does not follow, that because an action of trover would lie on the 12th July,—and afterwards an action for money had and received for the proceeds of the bonds, when the bonds were sold,—that *Hagan* was thereby divested of his right

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to bring trover. *Hagan* seeks now to adopt part of the transaction, and repudiates the rest. This he cannot do. If he claims the proceeds of the sale, it can only be against the joint estate. The view which the Commissioner took, in admitting the proof against the separate estate, though subtle and ingenious, cannot be supported; and the proof against the separate estate ought to be expunged.

Mr. *Swanston*, and Mr. *G. Richards*, *contrà*. The only question is, whether Mr. *Hagan* has not a right of proof against the separate estate of *Warwick*, for the amount of the bonds deposited by him with *Warwick*, and which the latter pledged for his own purposes. They were then stopped by the Court.

ERSKINE, C. J.—It appears to me, that the Commissioner was perfectly right, in admitting the proof of *Hagan* against the separate estate of *Warwick*; though I do not mean to say, that he might not have a right of election to prove, either against the separate, or the joint estate; inasmuch, as he might perhaps have confirmed the appropriation of the proceeds of the bonds by the partnership of *Warwick & Clagett*, and have proved against their joint estate for the value of the bonds for 40,000 dollars, as so much money had and received to their use. But that will not affect his right of proof against the separate estate of *Warwick*. The bonds were deposited by *Hagan* with *Warwick* before the partnership with *Clagett*, and were also pledged by *Warwick* with the house of *Overend & Co.*, before the introduction of *Clagett* into the firm. If *Warwick* was authorized to pledge them, he became a debtor to *Hagan* for the amount; if not, then

there was something like a breach of trust; and in either case a debt was created from him to *Hagan*, and a right of proof by the latter against his estate. Has any thing then occurred to take away this right of proof from *Hagan*, as it existed before the partnership of *Warwick & Clagett*? I do not think, that the correspondence between the parties takes away the right; for that only shows, that Mr. *Hagan* was willing to apply the bonds for the purpose of raising money to the extent of 10,000*l.*, to pay off the acceptances of *Warwick & Clagett*. This, however, has not been done; and funds for that purpose were provided by *Hagan & Magee*, to the extent of 7000*l.* Besides, at the very period of the correspondence, it appears that the bonds had been actually pledged by *Warwick* with *Overend & Co.* for his own separate debt, without the knowledge of *Hagan*. And the mere circumstance of *Warwick & Clagett* having afterwards got possession of the bonds, and having sold them, does not take away the previous rights of *Hagan* against *Warwick*, in whose hands he had placed them prior to the partnership.

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Sir JOHN CROSS.—It appears from the correspondence between these parties, that *Warwick* writes word to *Hagan*, that he held the bonds as security for his acceptances in *Hagan's* favour, to the extent of 10,000*l.*; and that *Hagan* never knew, at that time, how the bonds had been actually disposed of. The bonds having been pledged by *Warwick* for his own benefit, he became liable to an action for money had and received.

Sir GEORGE ROSE.—The question before the Commissioner was a very simple one, and I think the con-

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clusion he has come to upon it is the right one. The property in question was placed in *Warwick's* hands, in the character of a trustee, for the purpose of covering the acceptances of bills drawn upon him by *Hagan*; and any disposition of this property by *Warwick* will, of course, render him separately liable to *Hagan*. It is contended, however, that the subsequent dealings between the parties alter the case, and that the appropriation of the specific funds, for the purposes of the partnership of *Warwick & Clagett*, renders the firm jointly liable, and discharges the separate liability of *Warwick*. But, in either way of putting it, *Hagan* had a right of election against the separate, or the joint, estate. The only question is, whether, in the course of *Hagan's* correspondence with *Warwick & Clagett*, he adopted their joint liability for the amount of the bonds, instead of the separate liability of *Warwick* incurred by him on the 12th July, when it is stated that he dealt with this property for his own private purposes. Does the subsequent correspondence, then, vary the previous right of *Hagan* to treat *Warwick* as his separate debtor? I must own, I have read the correspondence with some attention, and do not find that it has in any way varied that right.

Mr. *Maule* then applied, that the sum of 3000*l.* might be ordered to be deducted from the amount of the proposed proof; as *Hagan & Co.* had only remitted 7000*l.* towards the payment of the bills for 10,000*l.*, which had been paid by *Warwick & Clagett*.

Mr. *Swanston*. The state of account between *Hagan*



and *Warwick* was never displaced by any subsequent dealings between him and *Warwick & Clagett*.

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MEINERTZ-  
HAGEN  
and others.

ERSKINE, C. J.—The Order will be for the proof of *Hagan's* debt, with liberty for the assignees to apply for a reduction of it by set-off, or otherwise.

The ORDER was, that the proof should stand against the separate estate of *Warwick*, but without prejudice to the reduction of it by set-off or otherwise, and that the petitioners should have their costs out of the estate of the bankrupts.

Ex parte THOMAS BRETTELL and others.—In the matter of JAMES GOREN.

Westminster,  
Jan. 29 and 30,  
1838.

THIS was a petition of an equitable mortgagee, and the assignees of the bankrupt, praying for the specific performance of a contract against the purchaser of the mortgaged premises.

Where the common Order is made for the sale of the bankrupt's estate, on the petition of an equitable mortgagee, the Court of Review has jurisdiction to compel the purchaser specifically to perform his contract, and, for that purpose, to refer it to the Registrar of the Court, to inquire whether the vendors can make a good title to the property.

In July 1834, the equitable mortgagee presented the usual petition to this Court, for the sale of the property; whereon the common order was made. In pursuance of this order, the property was, in September 1834, put up for sale by public auction before the Commissioner, subject to the conditions of sale contained in the printed particulars of sale then exhibited. By these particulars the sale was stated to be "by order of the Court of Review in Bankruptcy;" and by the last condition it was stipulated, that if any mistake were made in the description of the premises, or any other error whatever should

But see post,  
Ex parte Cuitts.

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appear in the particulars, such mistake or error should not vitiate the sale, but a compensation should be given, or taken, as the case might require. The purchaser paid the usual deposit, and signed the following memorandum :—

“ Memorandum : I hereby acknowledge to have purchased the manor of Chertsey Bermond, as described in the annexed particular, at the sum of 3600*l.*, and having paid the sum of 540*l.* as a deposit, and in part-payment thereof: And I further agree to pay the remainder of the said purchase-money and complete my contract, according to the conditions of sale: And I bind my heirs, executors, administrators, and assignees, to a strict fulfilment of the same. As witness my hand this 18th day of September 1834.

“ *John Cutts.*”

Upon the abstract of the title being delivered, *Cutts* took various objections to the title. The petition stated, that the whole of these objections, except such as went to the compensation, had been satisfactorily answered; and that the only ground of compensation was, that the actual particulars of the two kinds of copyhold property fell short of the representations in the particulars of sale.

The prayer was, that *Cutts* might be ordered specifically to perform the contract of purchase, and pay to the petitioners the balance of the purchase-money, with interest, subject to allowance of such compensation (if any) as in the judgment of the Court *Cutts* might be entitled to; and that, if necessary, it might be referred to the proper officer, to ascertain and state whether the petitioner could make a good title to the premises, and whether *Cutts* was entitled to any compensation.

Mr. *Bacon*, and Mr. *Evans*, in support of the petition, were stopped by the Court.

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and others.

Mr. *Swanston*, with whom was Mr. *Lee*, then contended that this Court had not jurisdiction to make the order prayed for, and that the only remedy was by filing a bill in equity against the purchaser for a specific performance of his contract.

The COURT, however, thought the petitioners were entitled to the order. But, upon its being intimated that Mr. *Lee*, who was absent, wished to address the Court on the subject, they deferred pronouncing a final order, until they heard the observations intended to be offered by Mr. *Lee*; and the matter stood over for that purpose.

Mr. *Lee* was now heard in opposition to the Order.

January 30.

The subject may be considered, 1st, as to the *discretion* of the Court to make the proposed order; 2dly, as to its *jurisdiction*.

It is not in every case, that the Court ought to make a summary order to refer it to the Registrar, to inquire whether the vendor of an estate can make out a good title to the purchaser; and, supposing it to have jurisdiction to do so, it is a matter for the discretion of the Court, to be exercised according to the circumstances of the particular case. In the present case, the following objections arise to the completion of the purchase: 1. The vendor, by the conditions of sale, engaged that the manor extended over 5900 acres of land; and he has not proved that there was land to that extent. 2. It has not been shown by whom the quit-rents are payable. 3. The

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number of tenants of the manor has not been proved. 4. The lord's right to timber and heriots has never been proved, although this right is particularly specified in the conditions of sale. 5. There has been an insufficient appointment of a new trustee, in execution of the trusts to which the property was subject. [*Erskine*, C. J. Is there any fatal error in the particulars of sale? Is it not merely a mis-statement as to quantity, which is the subject of compensation?] [Sir *G. Rose*. Your argument is premature; all these matters must go before the Registrar. It is a question of title, or compensation.] The objections to the title are of so complex a nature, that this is not a proper case for the Court to exercise its discretion, in ordering the purchase to be completed.

But it is submitted, that the Court has no jurisdiction to make such an Order as the one sought by this petition. The first and only case before the establishment of this Court, in which such a jurisdiction has been assumed in bankruptcy, is that of *Ex parte Gould* (a); but that case is not an authority, because it was decided *ex parte*, and because it does not appear from the report, that the attention of the Court was drawn to the question of jurisdiction. Moreover, the authority of that case is contradicted by the whole practice of the Court of Chancery, as appears from a note to the last edition of Sugden's Law of Vendors and Purchasers, p. 60. It is true, that *Ex parte Gould* was relied on, as an authority by this Court, in *Ex parte Sidebottom* (b), and by the Lords Commissioners in *Ex parte Barrington* (c), where Lord Commissioner *Shadwell* said, that although *Ex parte Gould* was the only authority for the

(a) 1 G. &amp; J. 231.

(c) 4 Deac. &amp; C. 437.

(b) 3 Deac. &amp; C. 818.

order there made, still, as it was never reversed or appealed from, that case was quite enough. In *Ex parte Gould*, the reporter refers to the case of *Ex parte Partington* (a), where Lord *Manners* appears to have thought that he had authority to open the biddings at the sale of an estate, under an order in bankruptcy, upon an early application; but Sir *Edward Sugden*, with reference to that case, says, "This, however, never has been done; nor is there any reason to suppose that so mischievous an extension of the rule (i. e. of opening biddings on sale before the Master), will ever take place (b). [*Erskine*, C. J. Is not this Court conclusively bound, on the question of jurisdiction, by the decision of the Lords Commissioners in *Ex parte Barrington*, and must we not act on that decision?] I do not mean to impugn the decision in *Ex parte Barrington*; but I contend, this case differs from that; there the purchaser had waived any objections to the title, which is not the fact in this case. Here the objections to the title are numerous and complicated; and the machinery of this Court does not enable it satisfactorily to dispose of difficult questions of title to real property. When that case was before this Court, his Honor the Chief Judge said, in answer to the difficulties that had been urged, as to the want of proper officers in this Court to investigate questions of title, "When any case hereafter may arise, which involves such difficulties, it will be then time enough for us to consider, whether we will take the burthen of deciding the case on ourselves, or send it to another tribunal where greater facilities may exist (c)."

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(a) 1 Ball & B. 209; 1 Rose, 367.

(b) Sugd. Law of V. & P. p. 65, note.

(c) *Ex parte Sidebottom*, 3 Deac. & C. 824.

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[Sir *G. Rose*. I do not think the last objection very tenable. When a reference as to a question of title goes before a Master in Chancery, and any difficulty arises in the law of real property, it is well known that the practice is, to lay a case before some experienced conveyancer, who actually decides the point, though the Master does so nominally. The same course would, no doubt, be pursued on a reference to an officer of this Court.] It is respectfully submitted, that a reference to the Registrar of this Court, on matters of title, would never give satisfaction to the profession, or to the public. The vendors, in the present case, having failed to make a good title, the purchaser has a right of action to recover back the deposit money; *Duke of Norfolk v. Worthy* (a). What jurisdiction has this Court to prevent the purchaser, in this case, from bringing such an action? With a view to further proceedings, and in order that the question may be fully considered by a superior tribunal, we must protest against the jurisdiction of the Court to make the Order prayed for by this petition.

ERSKINE, C. J.—I confess I have not seen any such difficulty, as what has been so strongly urged to us, against the propriety of making the Order asked by this petition. The first question is, as to the jurisdiction of the Court to make such Order; but that is settled by *Ex parte Barrington* (b). There can be no doubt that this Court is bound by the decision of the Lords Commissioners in that case. But we are then told, that there is a distinction between the facts of that case and this, inasmuch as in that case no question of title was brought before the Court; while here, the main objection to

(a) 1 Camp. 337.

(b) 4 Deac. &amp; C. 437.

complete the purchase arises on a question of title. And we are referred to an observation of mine in that case, as to our refraining from dealing with questions of title. But what my learned colleague, Sir *G. Rose*, has said, is a sufficient answer to that objection, namely, that if the Registrar should not think himself qualified to decide the point, he can call in the assistance of a conveyancer, in the same way as is done by the Masters in Chancery, and be guided by his opinion; and when he makes his report, he can state the facts on which that opinion is founded. If the conclusion of the Registrar should be erroneous, and this Court confirm his report, the party who is dissatisfied may appeal to the Lord Chancellor, and from thence to the House of Lords. When the Registrar has made his report, therefore, all questions of title may still be open, and either party have the full benefit of a hearing before the Lord Chancellor, without the delay and expense of a bill and answer. I do not think, that what has been urged is of sufficient weight to induce us to refuse the order of reference to the Registrar.

Sir JOHN CROSS.—We have a protest against the jurisdiction of the Court in this case; but I think it my duty to maintain the jurisdiction of the Court to the utmost extent given by the act of parliament, which gives this Court superintendence and control in all matters in bankruptcy; and the only question is, whether the enforcement of a contract for the sale or purchase of the bankrupt's property, is not a matter in bankruptcy.

Sir GEORGE ROSE concurred.

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Ex parte  
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and others.

The ORDER was, that it should be referred to the Registrar to ascertain and state whether the petitioners could make a good title to the manor; and if he should find that they could do so, then that he should state to the Court, when it was first shown that such good title could be made, and whether *John Cutts* is entitled to any and what compensation, by way of abatement or deduction from or out of the purchase-money, and on what ground, regard being had to the conditions of sale; and that all proper and necessary parties should be examined before the Registrar, upon interrogatories or otherwise, as he should think fit, and should produce before him all books, papers, and writings, in their custody or power, relating to the matters in question. Farther directions and costs to be reserved, with liberty for either party to apply to the Court as advised.

Registrar's Office,  
February 26.

Mr. *Lee* applied this day to the Court, for an order to stay proceedings before the Registrar, under the above order of reference, until the hearing of the appeal, which had been already brought, and was then pending, before the Lord Chancellor.

Sir GEORGE ROSE refused the application, with costs (a).

(a) See post, *Ex parte Cutts*.





1838.



Ex parte THOMAS BUNN.—In the matter of THOMAS  
BUNN.

Westminster,  
Jan. 10. 31.  
Feb. 10, 1838.

THIS was a petition of the bankrupt to annul the fiat and assign the bond, on the ground that the petitioning creditor had set up a deed of assignment of the bankrupt's property as an act of bankruptcy, although the petitioning creditor himself was a party to the deed. It appeared, that the bankrupt being indebted to the National Provincial Banking Company in the sum of 2100*l.* on a banking account, the bankrupt's books were examined by a Mr. *Barton*, the company's agent, and negotiations entered into for an arrangement by friends, during the pendency of which the bankrupt was arrested on the 1st November at the suit of the company, for the amount of the debt. Whilst the bankrupt was in custody, he was induced, at the instigation of *Barton*, to execute an assignment, on the 3d April, of all his estate and effects to trustees, for the benefit of his creditors; to which assignment *Barton* was a party. Under this deed, property to the amount of 20*l.* 14*s.* was got in and sold; which sum was paid into the company's bank; but on the 13th November the company issued a fiat against *Bunn*, and *Barton* deposed to the execution of the deed of assignment by *Bunn*, as the act of bankruptcy. The petition had been served on the assignees under the fiat, who did not appear.

If a creditor, who is a party to a deed of assignment of a trader's property for the benefit of his creditors, issue a fiat against him, it will be annulled, with costs.

Mr. *Stinton*, in support of the petition, contended, that a party to a deed of this description could not set up the deed itself as an act of bankruptcy.

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Ex parte  
Bunn.

Sir GEORGE ROSE.—Further than that—he cannot set up any other act of bankruptcy.

ERSKINE, C. J.—As the facts stated in the petition are not contradicted by affidavit, they are amply sufficient to entitle the petitioner to the order he seeks. You may therefore take an Order for annulling the fiat, with costs against the petitioning creditor; but not for assigning the bond.

January 31.

On a petition by the bankrupt to annul the fiat for want of the proper requisites, where the affidavits are diametrically opposite as to the facts, the Court will direct either a *voir dire* examination, or an issue; which, if taken by the bankrupt, will be under his liability to the costs.

Mr. *Girdlestone* now appeared on behalf of the respondents, and said, that they had been unable to furnish proper instructions and affidavits in time for the hearing yesterday, but that they had since arrived; and as no wilful delay had been imputed to them, he hoped the Court would permit them to be heard in opposition to the petition.

The COURT said, that they would suspend the drawing up of the Order, on payment of costs, and would leave it to the parties to arrange between themselves as to the rehearing of the petition.

February 10.

The matter came on again this day before his Honor Sir G. Rose, when

Mr. *Girdlestone* read the affidavits on the part of the respondents, which alleged, that previous to the bankrupt's executing the trust deed, it was specifically explained to him, that Mr. *Barton*, although connected with the company, became a party to the deed in a private capacity; and that it was stipulated that the deed was to be no bar to the issue of a fiat, if thought advisa-

ble, and that it would be in that case treated as an act of bankruptcy.

1838.

Ex parte  
BUNN.

Mr. *Stinton*, in support of the petition, read affidavits in reply, which contradicted these allegations of the respondents.

Sir GEORGE ROSE.—I am anxious to relieve the bankrupt, if possible; but the affidavits are diametrically opposite, on the statement of facts, and I cannot venture to decide on probabilities. I shall therefore pronounce no opinion on the validity of the fiat; for I feel it painful to be pressed to decide a question, where it would be requisite to say that perjury has been committed on one side, or the other. I am unable, on the mere application of the bankrupt, under these circumstances, to annul the fiat. But the petitioner may, if he chooses, have a *viva voce* examination of all the parties,—or take an issue, whether the bankrupt was told that the right of issuing a fiat was reserved, and whether he executed the deed, on the faith of its being considered a final settlement. I do not think this is a petition on which the bankrupt ought to be subjected to costs; but the issue, if taken, must be under that liability.

Ex parte NAINBY.—In the matter of NAINBY.

THIS was a petition of the bankrupt to annul the fiat, on the ground that it was fraudulently concocted, and that there was no valid petitioning creditor's debt.

Westminster,  
Jan. 31, 1838.

The bankrupt concocted a fraudulent fiat, in concert with the petitioning creditor, upon a fictitious debt; but three days before it issued gave notice to the other parties, that he would go no further with the project; and after it issued petitioned to annul it:—*Held*, that, being *particeps criminis*, he had no *locus stundi* to present a petition for that purpose.

1838.

Ex parte  
NAINBY.

The petitioner stated, that having been many years a prisoner in the King's Bench, he became a party to an arrangement for a friendly fiat, under which he might be enabled to obtain his discharge. That, in furtherance of this plan, four bills of exchange for various amounts were antedated, and accepted by the bankrupt, and placed in the hands of the petitioning creditor and other persons, for the purpose of proving them under the fiat; for which bills no consideration whatever had been given. He further stated, that having repented of entering into this nefarious plan, he, on the 3d October, gave notice to the other parties, that he resolved to go no further with the project, and desired all further proceedings to be withheld; but that, in spite of this notice, *Lambert*, the petitioning creditor, three days afterwards, issued the fiat; that some of the fictitious debts had already been proved at the first public meeting, but that, on the bankrupt having threatened to expose the truth, the parties did not intend to make their appearance again.

The petition was presented some days before the day appointed for the last examination; but the bankrupt had surrendered, and his last examination was adjourned to a future day, the Commissioners thinking it right so to do, as the bankrupt had informed them of his intention to petition to annul the fiat.

In answer to the petition, *Lambert* swore that he lent the money to the bankrupt, for which the bill was given; but he omitted to state when or where it was lent, or for what purpose.

Mr. *Twiss*, and Mr. *Prater*, in support of the petition. Although the bankrupt originally contemplated being a party to this improper proceeding, yet he had a *locus*

*penitentia* in the matter, of which he had availed himself three days before the fiat issued. The bankrupt, therefore, was not a party to the present fiat. And the provision in the 1 & 2 Will. 4. c. 56. s. 42., which declares that no fiat shall be annulled on the ground of its being concerted between the bankrupt and the petitioning creditor, does not apply to this case, which is not merely a concerted, but a fraudulent, fiat. The question however now was, whether the Court would allow any party to avail himself of such an abuse of the Great Seal, by permitting the present fiat to stand.

1838.

Ex parte  
NAINBY.

Mr. *Swanston*, *contra*, was stopped by the Court.

ERSKINE, C. J.—If the bankrupt's statement is true, a more disgraceful transaction was never brought before this Court; and the petitioning creditor, the assignees, the solicitor, and his clerk, are all guilty of a great offence. But it is enough to deal with the petition, as far as regards the bankrupt, on his own affidavit. The bankrupt admits, that he was a party to the original fraud, but that he afterwards repented before the fiat issued; and yet he stands by at the first public meeting, and sees parties proving debts and perjuring themselves, without making any objection before the Commissioners to such proofs. The Court cannot stir, upon the application of a party to all this fraud, and must dismiss this petition, with costs; and it is the duty of the Court to put the proceedings under the fiat into the hands of them, who will prosecute the guilty parties.

Sir JOHN CROSS.—There is no evidence of the facts alleged in this petition, except that of the bankrupt him-

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Ex parte  
NAINBY.

self, and he is not confirmed in his testimony by any other person. He comes here to deny the existence of all the debts that have been proved against him, upon his own individual unsupported assertion. It is quite enough, upon this ground, alone to dismiss the petition.

Sir GEORGE ROSE.—Even if we were satisfied that there was no good petitioning creditor's debt, we should not interfere on this petition.

Petition dismissed, with costs ; and the proceedings under the fiat ordered to be retained by the Registrar.



Westminster,  
Jan. 31, 1838.

An order of dismissal cannot be drawn up, if the petition has not been filed in the office.

The proper course is, in such case, to move to discharge the fiat at the foot of the petition, with costs.

Ex parte CARNES.—In the matter of GRIFFITHS.

WHEN this petition was called on, on a former day, no one appeared to support it, and it was consequently, on the application of the counsel for the respondents, dismissed with costs. The solicitor, on applying at the Office for the order of dismissal, was informed that the petition had never been filed there, pursuant to the General Order (a), and that the Registrar therefore could not draw up the order, as there was no petition among the records of the Court, to which the order of dismissal could apply.

(a) By one of the General Rules and Orders, made 12th January 1832, for regulating the practice of the Court of Bankruptcy on its first establishment, it is ordered that all petitions presented to the Court of Review shall be entered at the Registrar's Office, and that the original petition shall, when served, be returned to the Registrar on or before the hearing, and be filed of record.—See Rule 30, 1 Deac. & C. Appendix, XXIX.

Mr. *Bethell*, for the respondents, now moved for an order on the petitioner to file the petition.

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Ex parte  
CARNES.

Sir GEORGE ROSE.—The proper course seems to be, to take an order to discharge the fiat at the foot of the petition, which directs the attendance of the parties, with costs; and to give the respondents the costs of this application.

Mr. *Keene*, who now appeared for the petitioner, requested leave to file the petition, as the solicitor was apprehensive that he might not otherwise be allowed his costs.

The COURT, on this suggestion, ordered the petition to be filed *nunc pro tunc*, and the order of dismissal to be drawn up.

Ex parte GEORGE HALL and others.—In the matter of BENJAMIN BOOTHBY the elder, and BENJAMIN BOOTHBY the younger.

THIS was a petition of several creditors, who had proved under the joint estate, praying that the dividends might be stayed on the proof of another debt against that estate, under the following circumstances.

The bankrupts carried on business at Nottingham, in partnership with *William Bacon Rawson*, upon whose death, in 1829, the partnership was continued with his executors, until the 1st December 1830; when it was

*Gray's Inn Hall,*  
*March 13, 1838.*

Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelve-month longer, and then dissolve the partnership; upon which occasion the two continuing partners give the executors a

bond to secure the balance due to them; and more than six years afterwards the two become bankrupt. *Held*, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners.

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Ex parte  
HALL  
and others.

dissolved, and notice of such dissolution was duly published in the London Gazette. The petition alleged, that when the partnership was dissolved, the firm was wholly insolvent, and that some of the debts were still owing on the joint acceptances of the bankrupts and *Rawson*. On the dissolution of the partnership, the bankrupts entered into a bond to *Rawson's* executors, to secure to them the payment of 4200*l.* and interest, which was the amount of the capital that *Rawson* had brought into the business; the bankrupts taking upon themselves the payment of the partnership debts. They also entered into a bond to one of the executors to secure the sum of 2500*l.* and interest, which sum had been advanced by the executor to the firm, during the continuance of the partnership. The petitioners alleged, that the joint creditors of the partnership never adopted the bankrupts as their debtors, or released their rights against the partnership.

On the 27th February 1837, the fiat issued against the bankrupts; under which, it was alleged, several joint creditors of the former partnership had proved debts; but it appeared, that the petitioners themselves were merely creditors of the two bankrupts. *Rawson's* executors applied to prove for the 4200*l.* secured by the bond of the bankrupts; when the petitioners objected to the proof, on the ground that a partner could not prove in competition with the creditors of the firm; but the proof was admitted by the Commissioners. On the 8th November last, a meeting was held to declare a dividend, when the petitioners again objected to any dividend being paid on the debt proved by *Rawson's* executors; but the Commissioners thought otherwise; and on the following day the petitioners gave notice to the assignees



not to pay any dividend on such debt. Since the proof was made, both the executors of *Rawson* had died; and *John Read*, the present representative of the surviving executor, had become the legal representative of *Rawson*. The estate of the bankrupts was not sufficient to pay the joint creditors in full.

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*Ex parte*  
 HALL  
 and others.

The prayer was, that the proof for the 4200*l.* might be expunged, or be allowed to stand only as a claim; that it might be declared that *Rawson's* estate was not entitled to receive any dividend on such proof, until the debts of the joint creditors were paid; that the assignees might be restrained from paying any such dividends; and that the amount of the dividend already calculated on such proof might be carried to the joint estate, and divided amongst the joint creditors.

Mr. *Swanston*, and Mr. *K. Parker*, in support of the petition. It is decided, that one partner cannot prove or claim against the joint estate, until all the joint debts are satisfied; *Ex parte Ellis*(a); nor even against the separate estate; *Ex parte Carter*(b). In the last cited case Lord *Eldon* says, "The bankruptcy having occurred, the question arises, whether the executors of *Godwin* (a deceased partner) have a right to prove that, which, as between the remaining partners and *Godwin's* estate, is clearly a debt; and the answer is, that the estate which they represent is itself debtor to the joint creditors, who have proved under the Commission, and that the executors, therefore, cannot prove in competition with them—with those who are, in fact, their own creditors. But it is argued, in reply, that the executors have a right to claim against the separate estate, there

(a) 2 G. & J. 312.

(b) 2 G. & J. 233.

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being, as it appears, no joint estate; but I never yet heard of a case, where a surety, not being in a situation to prove, has nevertheless been allowed to claim." That case clearly shews, not only that a creditor cannot prove against the joint estate, but that he also cannot prove against the separate estate, while any joint debts of the firm remain unpaid. There is no distinction in principle between the two cases; the rule applies to the separate estate, as well as it does to the joint. In *Ex parte Grazebrook*(a), the Court said, that the joint creditors could take no dividend under the separate commission, until all the separate creditors were satisfied. And the Court, in commenting on the case of *Ex parte Moore*(b), which had been there cited in argument, drew a distinction between that case and *Ex parte Grazebrook*, observing, that in the former the question was merely, whether a solvent partner, at the time of the bankruptcy, could prove against the joint estate, upon indemnifying the joint creditors. The principle now contended for is this: that where there are joint creditors unpaid, a partner cannot prove either against joint or separate estate. The question here is, whether a partner can prove, not exactly against the joint estate of the three, nor against the separate estate of one, but against the estate of two, formed in a great measure from the original estate of the three. *Rawson's* executors continued in partnership with the two surviving partners until this bond was given, when there was a fund of the three'; but at which period, it is pretty clear, the firm was wholly insolvent.

(a) 2 Deac. &amp; C. 189.

(b) 2 G. &amp; J. 166.

Mr. *Twiss*, and Mr. *Barber*, who appeared for the executors, were stopped by the Court.

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Mr. *Mylne* appeared for the assignees.

ESKINE, C. J.—This is an application to expunge a proof on a bond against the joint estate. The objection made to the proof is, that the executors of *Rawson*, one of the former partners of the firm, would, if such proof were permitted to stand, come in competition with creditors, to whom they are conjointly liable with the bankrupts. Now, considering that the bond in this case was given six years before the bankruptcy took place, it appears to me, that the petitioners have not made out their allegation, that the respondents would come in competition with the joint creditors of the three, at the time the bond was given. It is not pretended that there was any fraud, in taking the account at the time of the dissolution of the partnership; nor that any of the creditors were dissatisfied with the arrangement which then took place. If then all the creditors at the time agreed to the arrangement, how can the executors be said to come in competition with those creditors? But the executors in this case do not come against the estate of the three, but against the estate of the two. It has been said, that if there should be a surplus of the estate of the two, that could be carried to the estate of the three, so as to form a fund for the payment of the joint debts of the three; but that is a very remote consequence. In *Ex parte Carter(a)*, the name of the partner, whose executors in that case sought to prove, was continued in the firm down to the very period of the bankruptcy; and debts,

(a) 2 G. & J. 233.

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for which he was liable at the time of his death, had been proved under the commission to a large amount; so that, in that case, the party attempting to prove must necessarily have come in collision with his own creditors. But in this case the objection does not apply, nor does the decision in *Ex parte Carter* touch the question now before the Court. It is not necessary to decide, whether it is competent to these petitioners to set up the objection to this proof; my opinion being founded on the fact, that the party here, in the proof that has been made, does not come in competition with any creditors to whom he is justly liable with the bankrupts.

Sir JOHN CROSS.—Here certain creditors of the new firm claim a right to have this proof expunged, because they say it is detrimental to the interests of the creditors of the old firm; resting their claim to the interference of this Court, not on any right of their own, but on a *jus tertii*, with which they have nothing to do. The bond in this case was given by Messrs. *Boothby* to the executors, no less than seven years before the bankruptcy. The executors have, therefore, two answers to give to any claim, that might be set up by the creditors of the old firm: 1st. They have a right to say, “you are barred by the Statute of Limitations;” 2ndly. “You agreed to take the continuing partners as your debtors.” There is not a shadow of right in these petitioners for presenting this petition.

Sir GEORGE ROSE.—I am not aware of any case, where, upon a *bonâ fide* dissolution of partnership, and a balance struck as due to the retiring partner, or a bond or promissory note given for the balance—for it

makes no difference in principle, a bond or note being only evidence of the debt—I say I know of no such case, where, after the creditors of the firm have tacitly consented to the arrangement, it has been held that the retiring partner could not prove the amount of his debt against the estate of the continuing partners, in the event of their subsequent bankruptcy. In *Ex parte Cook* (a), which occurred before Lord *Brougham*, it was held, that where a member of a firm, who carried on business on his separate account, supplied goods to the firm, and a commission issued against the firm, the debt was provable against the joint estate. I am not sure, whether that case was reported when *Ex parte Grazebrook* was decided (a); but there is a remarkable coincidence between what Lord *Brougham* said in that case, and the principles on which this Court professed to act in *Ex parte Grazebrook*. The right which a retiring partner has in making out his equity against the estate of the continuing partners, in the event of their bankruptcy, is on the principle of a surety, or person liable, for the debt of another. He cannot prove against the joint estate, until an account is taken, and all the joint debts are paid. The only difficulty is, on a question of proof between partners, in carrying the case to that extent. But the state of things here is this—the executors of a deceased partner carry on the business of the testator for a twelvemonth after his decease, in conjunction with the surviving partners, and dissolve the partnership more than six years previous to their bankruptcy. It does not appear, that there are any outstanding creditors of

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(a) Mont. Rep. 228.

(a) *Ex parte Cook* was decided June 30, 1831, and was reported before *Ex parte Grazebrook* occurred, which was not till December 14, 1832.

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the three; nor is it pretended that the estate, against which the executors have proved, is one against which the creditors of the three can prove. But it is said, that by a certain sort of circuitry, the surplus of the estate of the two would accrue for the benefit of the estate of the three. But, even in that way of putting it, if none of the creditors of the three remain unsatisfied, such a possible accruing surplus would not, in the slightest degree, affect the right of proof of *Rawson's* executors against the estate of the two.

Petition dismissed, with costs.

Gray's Inn
Hall,

Mar. 13, 1838.

Special order made as to the disposal of the bankrupt's goods, which one assignee had taken in execution, and which the other assignee claimed as having been left in the reputed ownership of the bankrupt.

Ex parte BISHOP.—In the matter of BIRD.

THIS was the petition of an assignee, for the removal of his co-assignee, and that he might be ordered to deliver up to the petitioner the effects of the bankrupt in his possession, on the following grounds:—It appeared that *Berry*, the assignee now sought to be removed, had, on the 6th September last, taken out an execution against the bankrupt's effects; but the bankrupt continued in possession of all his goods and furniture up to the period of his bankruptcy, which occurred on the 9th December, and the goods still continued on the premises occupied by the bankrupt at the time of his bankruptcy. The petitioner was advised, that under these circumstances the goods belonged to the creditors, as being in the reputed ownership of the bankrupt at the time of his bankruptcy; and the petitioner was desirous of bringing an action against *Berry*, for the purpose of recovering

the goods, and dividing the proceeds among the bankrupt's creditors.

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Mr. *Bacon* appeared in support of the petition.

The COURT ordered, that the property should be sold, and the proceeds paid into Court, subject to an issue, the question to be, "Whether, at the time of the bankruptcy, the property, or any part of it, was in the order and disposition of the bankrupt, as the true owner;" or, that it might be referred to the Commissioners to determine the question, as the parties might agree; with liberty to either party to apply to the Court; the Order to be on both assignees.

Ex parte MARKS and another.—In the matter of
MARTIN HENRY COLNAGHI.

Gray's Inn
Hall,
March 14,
April 27, 1838.

THIS was a petition of assignees to expunge a proof, under the following circumstances:—

By an indenture, bearing date the 27th April 1831, and made between *Jean Jacques Francois Coindet*, of the first part, *Martin Henry Colnaghi* (the bankrupt), of the second part, *Thomas Maude Galloway*, of the third part, and *Charles William Hallett*, a trustee for *T. M. Galloway*, of the fourth part, after reciting that *Galloway* had contracted with *Coindet* for the purchase of an annuity of 100*l.*, for the sum of 1000*l.*, which was agreed to be secured by a judgment to be confessed by *Coindet*, and *Colnaghi as his surety*, for double the

A. grants an annuity to *C.*, and *B.* jointly and severally covenants with *A.* (as his surety) to pay the annuity, provided that if default should be made in payment of the annuity by *A.*, *C.* would give notice in writing of so much of the annuity as might be in arrear, twenty-one days' previous to the adoption of any measures

against *B.* to enforce the payment of the arrears. *B.* becomes bankrupt, before any default is made by *A.* in the payment of the annuity. *Held*, that *C.* could not prove for the value of the annuity, under the provisions of the 6 *Geo.* 4. c. 16. s. 54.

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amount of the purchase-money, It was witnessed, that in consideration of 1000*l.* paid by *T. M. Galloway* to *Coindet*, *Coindet* granted to *T. M. Galloway* an annuity of 100*l.*, payable during the lives of *T. M. Galloway*, and one *F. Galloway*, and the life of the survivor of them. And *Coindet* and *Colnaghi* jointly and severally covenanted with *T. M. Galloway* for the due payment of the annuity by quarterly payments. The deed then contained a proviso, in substance as follows :—" Provided nevertheless, that when and so often as default shall be made by the said *J. J. F. Coindet* in the payment of the said annuity, the said *T. M. Galloway* shall and will give to the said *M. H. Colnaghi* notice thereof in writing, and a demand of payment of so much of the annuity as may be in arrear, twenty-one days previous to the adoption of any measures whatever to compel the performance of the covenant on the part of the said *M. H. Colnaghi* in that behalf hereinbefore contained, such notice or demand in writing to be served on the said *M. H. Colnaghi*, by leaving the same at his usual or last place of abode."

The annuity was further secured by a warrant of attorney to enter up judgment against *Coindet* and *Colnaghi*, for the sum of 2000*l.*, but subject to a defeazance that execution should not be issued against *Colnaghi*, unless the annuity should be in arrear for forty days or more, and twenty-one days' notice in writing of such arrear should have been previously given by or on behalf of *T. M. Galloway* unto *Colnaghi*.

On the 28th February 1832, a fiat issued against *Colnaghi*; no default having previously been made in the payment of the annuity. *T. M. Galloway* had been permitted to prove for the sum of 750*l.*, as the value of the

annuity ascertained by the Commissioners. The bankrupt had obtained his certificate.

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Mr. *Twiss*, and Mr. *Bethell*, in support of the petition. This is not such an annuity as can be proved against *Colnaghi*, within the provisions of the 6 Geo. 4. c. 16. s. 54. In *Thompson v. Thompson* (a) it was held, that the instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. [*Erskine*, C. J. The difference between *Thompson v. Thompson* and this case is, that there the covenant was only to pay in default of the principal. Here the covenant is to pay at all events.] Still, the covenant is in the character of surety; and Lord Chief Justice *Tindal*, in *Thompson v. Thompson*, says, "It is obvious, that the act has made no provision for the proof of the present value of the whole annuity against the estate of the surety." The same decision had been come to in the same case, when it was previously before this Court; *Ex parte Thompson* (b). In *Ex parte Marshall* (c), where the question was, whether the obligee of an indemnity bond could prove against the obligor, before he had sustained any pecuniary loss, Sir *G. Rose*, in addressing himself to the counsel for the petitioners in the course of their argument, says, "Does it appear, that the petitioners have already sustained damage, by having paid the amount of the verdict? If not, they cannot be allowed to prove." The question here is, whether the bankrupt were a surety to pay the annuity absolutely, or conditionally. Now the covenant,

(a) 2 Bing. N. C. 168.

(b) 2 Deac. & C. 126.

(c) Id. 589.

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by the bankrupt to pay the annuity is subject to a proviso, that where any default should be made by the principal debtor, the annuity creditor should give the bankrupt notice in writing, and a demand of payment of so much as might be in arrear, twenty-one days previous to the adoption of any measures whatever to compel the performance of the covenant. The proviso, therefore, forms an essential part of the covenant. Suppose *Galloway* had brought an action at law against *Colnaghi*, on the covenant, without alluding to the proviso, might not the defendant craveoyer of the deed, and set out the proviso, and then aver, that no notice or demand was given? [*Erskine*, C. J. As it is admitted, that *Colnaghi* was a surety, and no default was made by *Coindet* before the bankruptcy, I do not see that you want the aid of the proviso. If there had been default before the bankruptcy, then you might, perhaps, make something of the proviso.] There is a distinction between a bond, and a covenant,—a bond creates a present debt, but this is not the case with a covenant. Here there was no right of action against *Colnaghi*, at the time of his bankruptcy; and no debt can be proved against a bankrupt's estate, which the creditor could not sue him for at law. In *Johnson v. Compton* (a), where an annuity was secured by a covenant by a surety to pay the annuity, in case the principal made default, and there was a judgment for 2000*l.* entered up both against principal and surety; and the annuity remained unpaid from January 1823; and in February 1824, the surety became bankrupt; it was held, that neither the value of the annuity, nor the sum due on the judgment, was proveable, but only the arrears then due; as the surety was not an an-

(a) 4 Sim. 37.

nuity debtor, within the 6 Geo. 4. c. 16. s. 54. Here there is no relation whatever of debtor and creditor between *Galloway* and the bankrupt; for not even any arrears of the annuity were due at the time of the bankruptcy. In *Ex parte Myers* (a),—which was the case of a guarantie given by the bankrupt for the payment of the acceptances of a third person, none of which were due at the time of the bankruptcy,—this Court held, that they could not be proved against the surety, before they fell due, and were unprovided for by the principal. In this case it is clear, from the terms of the proviso, and the recital in the deed, that the bankrupt was a mere surety for the payment of the annuity by *Coindet*; and it is observable, that although *Colnaghi* joins with *Coin-*
det in the covenant to pay the annuity, the granting part of the deed is by *Coindet* alone.

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Sir JOHN CROSS.—I think the sole question in the case will be, whether the effect of the proviso will be to postpone the debt, or only to postpone the remedy.

Mr. *Swanston*, and Mr. *Forster*, *contrà*. There is a great distinction between the present case and that of *Thompson v. Thompson*, which has been cited by the other side. Here the covenant to pay is absolute; there it was only in case the principal made default; and this distinction is particularly dwelt upon by Lord Chief Justice *Tindal* in his judgment in that case. He says, "The defendant neither granted the annuity, nor covenanted absolutely for its payment; he only covenanted to pay, in case the grantor should make default." So in *Johnson v. Compton*, the covenant was only to take effect,

(a) 2 Deac. & C. 251.

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in case the principal made default. Here the covenant is to pay at all events. If there is an absolute covenant to pay, it is immaterial whether the party is surety, or not; for that of itself establishes the relation of debtor and creditor. Nor is the force of the covenant, in establishing the debt, lessened by the effect of the proviso; for, according to the case of *O'Kelly v. Sparkes* (a), *Galloway* might sue *Colnaghi* on the covenant, without giving him previous notice of the default of *Coindet*. In that case the facts were these:—The Prince of Wales had granted an annuity for his own life, payable by the treasurer of his privy purse, which was assigned by the grantee to the plaintiff, with the prince's assent; and a surety gave a bond to the assignee of the annuity, conditioned to pay it, if the prince, or the treasurer of his privy purse, or any other person for the prince, did not pay it at the respective quarter days. The annuity being in arrear, the assignee sued the surety, who pleaded that he was discharged by reason of the default of the plaintiff, in not complying with the provisions of the 35 *Geo. 3. c. 125. s. 7.*, which enacted, that every creditor of the prince, whose demand should accrue after the first quarterly day of payment of the prince's revenue, should deliver into the office of the treasurer of his privy purse, a particular in writing of the nature and amount of such demand, signed by him, within ten days after the expiration of the quarter in which such demand accrued; otherwise the debt or demand should be deemed to be barred; but it was held, that the surety was bound at all events at law, by the terms of the obligation, to pay the annuity if the prince did not, whether or not any default was made by the grantee or assignee of the an-

(a) 2 N. R. 421; 10 East, 369.

nuity, in not presenting a particular of his demand to the prince's treasurer, pursuant to the terms of the statute. But in the present case, as the covenant is joint as well as several, a joint action might have been brought by *Galloway* against *Coindet* and the bankrupt, without any notice to the bankrupt that *Coindet* had failed to pay the annuity; and the bankrupt could not have pleaded the breach of this proviso as an answer to the action. His only remedy would have been a counter action against *Galloway*, for omitting to give him notice, according to the terms of the proviso. The utmost effect that can be given to the proviso is, that it amounts to a covenant not to sue; and a covenant not to sue does not operate as a release.

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Mr. *Twiss*, in reply.

ERSKINE, C. J.—No case has been cited exactly corresponding with that before the Court. There are several cases in which it has been held, where the principal and the surety jointly covenant to pay the annuity, that although the covenantee is considered as an annuity creditor within the provisions of the Bankrupt Act, still that the bankruptcy of the surety does not affect the right of the annuity creditor to sue the other party on the covenant; as in *Baxter v. Nicholls* (a). Then there is another class of cases, as in *Thompson v. Thompson* (b), where the surety covenants to pay, if the grantor does not. In this case, the grantor and the bankrupt both jointly and severally covenanted to pay the annuity at certain stated times; and the question arises, whether the surety is individually liable, without any default of

(a) 4 Taunt. 90.

(b) 2 Bing. N. C. 168.

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the grantor. It appears to me, that *Thompson v. Thompson* would go the length of saying, that where the bankrupt is merely a surety, that the clause in the act of parliament did not apply. But then the question arises, whether *Colnaghi* is here to be considered a surety, or not. The covenant certainly is absolute; but then the proviso shows, that *Colnagni* was only to be liable in case of the default of *Coindet*. As it strikes me at present, it seems to be clear from the whole deed, that *Colnaghi* was merely the surety for the payment of the annuity; and this would bring the case, therefore, within the doctrine of *Thompson v. Thompson*. It was never the intention of the legislature, in introducing the words "annuity creditor" into the act of parliament, to intend that the surety for the payment of the annuity should be considered as the annuity debtor, and that the annuity creditor could prove for the value of the annuity against his estate, without any default of the grantor of the annuity. But I do not wish to give any final judgment on the point; which deserves mature consideration.

Sir GEORGE ROSE.—It appears to me, that the result of our deliberation, in any way of putting the case, must be against the proof. We have already decided, in *Ex parte Thompson (a)*, which decision was afterwards confirmed by the Court of Common Pleas in *Thompson v. Thompson (b)*, that where the covenant to pay the annuity is in default of the principal grantor, the annuity creditor is not entitled to prove against the surety, if no default has been made in the payment of the annuity before the bankruptcy. By a direct expression in the recital of the annuity deed, it is clear, that *Colnaghi*

(a) 2 Deac. & C. 126.

(b) 2 Bing. N. S. 168.

must be considered as a surety; and in the granting part of the deed, also, his name is omitted; by which it is plain, that *Coindet* was the sole grantor of the annuity, and that the covenant (in which *Colnaghi* joined) to pay the annuity, was not intended to be an absolute and positive covenant of *Colnaghi* to pay at all events, but merely as a surety for *Coindet*. Then the covenant for the payment of the annuity is so coupled with the proviso, that it is impossible to separate them. I construe the covenant thus: *Colnaghi* covenants to pay the annuity, in case the grantor makes default; but the default of the principal is not to give effect to the covenant, until the twenty-one days' notice is given, pursuant to the terms of the proviso.

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Sir JOHN CROSS.—As the case stands over for judgment, I have purposely refrained from offering my opinion.

*Cur. adv. vult.*

ERSKINE, C. J., this day delivered judgment as follows:—

April 27.

This case was brought before the Court on the petition of the assignees of the bankrupt, to expunge the proof of *Thomas Maude Galloway*, Esq., who had been admitted as an annuity creditor of the bankrupt, under the 54th section of 6 *Geo. 4. c. 16.* for the value of an annuity secured by the joint and several covenant of one *Jean Jacques Francis Coindet* and the bankrupt. The objection to the proof was, that the annuity in respect of which it was made had been granted, not by the bankrupt, but by *Coindet* alone, and that the bankrupt was responsible as surety only; that the 54th section of the

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Bankrupt Act, therefore, did not apply to this case; and that, as no part of the annuity was in arrear at the time of the bankruptcy, the proof ought to be expunged altogether. That *Coindet* was the sole grantor of the annuity,—that he alone had received the consideration,—and that the bankrupt's liability was contracted as his surety only,—was stated upon the face of the deposition on which the proof was made, and was admitted by the learned counsel for Mr. *Galloway* in their argument. It was also admitted, that if the bankrupt had in terms only covenanted to pay the annuity, in the event of *Coindet* failing so to do, the proof could not be supported; for, to that extent, the decided cases were precise and conclusive. But it was argued, that although in this case *Coindet* was the sole grantor, and the bankrupt had only become a party to the contract, in the character of surety for him; yet that he had absolutely covenanted for its payment on the stipulated days, and, therefore, that his was an absolute, and not a conditional or contingent undertaking, which rendered him liable precisely to the same extent, and in the same way as *Coindet* himself; and consequently that Mr. *Galloway* was as much the annuity creditor of one, as of the other. At the time of the argument I intimated my opinion, that although the instrument, by which the bankrupt's liability was created in this case, varied in form from the instrument on which the decisions were pronounced in the cases, *Ex parte Thompson* (a), *Thompson v. Thompson* (b), and *Johnson v. Compton* (c), yet that in substance the contract was the same in all the cases, and that Mr. *Galloway*'s proof ought to be expunged; and I gave my reasons for

(a) 2 Deac. &amp; C. 126

(c) 4 Sim. 37.

(b) 2 Bing. N. C. 168.



so thinking at the time. As the case, however, has stood over for final judgment, to enable one of the judges to examine the provisions of the deed, which had been fully stated, I have reconsidered the question; and, although my opinion remains unaltered, and indeed has been confirmed by a fuller examination of the cases, I will state the grounds upon which I think the proof ought to be expunged.

The covenant, upon which the proof is founded, is contained in a deed, to which the bankrupt, *Coindet*, and Mr. *Galloway*, are all parties; and by that deed, which recites that *Coindet* had contracted to sell Mr. *Galloway* an annuity of 100*l.*, for the price of 1000*l.*, to be secured (amongst other things) by a judgment to be confessed by *Coindet* and the bankrupt, as his surety, and that the 1000*l.* had been paid to *Coindet*, *Coindet* alone grants the annuity, and assigns certain property of his own as a collateral security for its payment; and the annuity is made subject to a right of redemption by *Coindet*, and by *Coindet* alone. But in this deed is inserted the following covenant, [his Honour here stated the covenant for the payment of the annuity,] and then follows this proviso [his Honour here read the proviso, for which see *ante*, p. 134.]

The 54th section of the 6 *Geo.* 4. c. 16., under which the proof was admitted, provides, "That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were, or were not, any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity," &c. The question then is, was Mr. *Galloway* an annuity creditor of the bankrupt, within the meaning of this clause? That he was an annuity creditor of *Coin-*

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*det*, the grantor, is unquestionable; because the statute expressly removes all objections to such a term being applied to cases where no arrears are due, even though the security rest in covenant. That he would have been equally the annuity creditor of the bankrupt, if the annuity had been granted by him jointly with *Coindet*, may be assumed on the authority of *Baxter v. Nicholls*(a), recognized by Mr. Justice *Bayley* in *Brown v. Lee*(b), even though the consideration was wholly received by *Coindet*, and though the bankrupt, as between himself and *Coindet*, had assumed the liability as surety only.

But here *Coindet* alone is the grantor; and the bankrupt's liability is on the face of the deed, as between him and the grantee, assumed only in the character of surety. In inquiring whether the grantee of an annuity may be admitted as an annuity creditor of a bankrupt surety so circumstanced, it may be of use to keep in mind the state of the law, before the first introduction of this provision into the Bankrupt law by the statute 49 *Geo. 3. c. 121. s. 17.* This cannot be better stated than in the language of Lord *Eldon*, in *Ex parte Thistlewood*(c), where his Lordship says, "Previous to the statute 49 *Geo. 3.*, if the annuity was secured by a covenant, the arrears only could be proved; if secured by bond and covenant, and there had been no failure, nothing could be proved; but if a failure had occurred, there was this difference between a bond and covenant, that under a covenant the arrears only could be proved, but under a bond, forfeited before the bankruptcy, the value of the annuity, as well as the arrears; and this

(a) 4 Taunt. 90.

(c) 19 Ves. 245.

(b) 6 B. & C. 689.

clause in the late act of parliament only provides, that in order to give the annuitant some portion of the property, it is no longer necessary that there should have been a breach of the condition of the bond." And this statement is borne out by reference to the cases of *Ex parte De Compte*(a), *Ex parte Bolton*(b). *Perkins v. Kemp-land*(c) and *Wyllie v. Walters*(d). But these were all cases of bankrupt grantors; and there is no instance that I can find of the grantee having ever been admitted to prove the value of an annuity against the estate of a bankrupt surety, even upon a bond forfeited; nor can I discover any equitable principle upon which such a proof could be allowed. For, although the Lord Chancellor properly took advantage of the legal debt created by the forfeiture of the penalty, for the purpose of working out an equitable adjustment of the real claim of the creditor against the insolvent estate of the principal debtor, by admitting the grantee of an annuity a creditor for its full value, yet the principles laid down in the cases of the *Overseers of St. Martin's v. Warren*(e), *Taylor v. Young*(f), *Davies v. Arnott*(g), and other cases, afford sufficient reason for not admitting the same proof against a bankrupt surety; namely, that although in law the penalty of a forfeited bond is considered as the debt, yet that it is only so considered, as a security for the money actually due; and that the debt really proveable in such a case is the amount of the injury sustained by the breach of the condition; but that in a case where this cannot be estimated, no proof can be made; or, as stated by Mr. Justice *Holroyd*, in *Taylor v. Young*, "In the

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(a) 1 Atk. 251.

(b) Id.

(c) 2 Bl. 1106.

(d) 2 Doug. 97.

(e) 1 B. &amp; Ald. 491.

(f) 3 B. &amp; Ald. 521.

(g) 3 Bing. 154.

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case of a bond with a penalty, the penalty is not the debt actually proved; but that which is proved, by reason of the penalty, is that which can be valued as a debt." Now, the liability of a surety for the payment of an annuity is necessarily uncertain and incapable of valuation, and therefore could not have been, before the 49 *Geo. 3. c. 121.*, the subject of proof, even though contracted by bond forfeited before the bankruptcy. The object, then, of the 17th section of the statute, 49 *Geo. 3. c. 121.*, appears to have been to place the relative right of the grantor and grantee of an annuity on precisely the same footing, whether the annuity was secured by covenant or bond, or both; and whether there had been any failure in the due payment before the bankruptcy, or not. But as there existed no such difference in the case of sureties, there was no reason for applying this enactment to them; and the provisions made by the 55th section of statute 6 *Geo. 4. c. 16.*, confirm the inference which might fairly be drawn from what I have already stated,—that it was no part of the object of the legislature to give to the grantee of an annuity any greater remedy against a mere surety contracting with him as such, than he had before. For, as was stated by Lord Chief Justice *Tindal*, in delivering the judgment of the Court of Common Pleas in *Thompson v. Thompson* (a), "it is obvious that the act has made no provisions for the proof of the present value of an annuity against the estate of a surety. If the whole annuity is allowed to be proved against the estate of the surety, there is no provision in the statute for reimbursing the surety, by enabling the assignees to look to the principal debtor for indemnity; whereas, in the case of the bankruptcy of the grantor, and the an-

(a) 1 Bing. N. C. 174.

nuity being proved against his estate, a provision is made for the indemnity of the surety by the 55th section; namely, that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity creditor against the bankrupt's estate. By this course, the whole of the annuity transaction is closed to all the parties, the grantor, the surety, and the annuitant. The absence, therefore, of any similar provision, in the case of the surety becoming a bankrupt, leads to the inference, that it was not intended to provide for such a case by the statute, but that it should be left as it stood at common law." This reasoning appears to me, not only to support the position for which it was introduced, that the value of an annuity could not be proved against the estate of a surety, under the 55th section,—but also to confirm the declaration made by the Lord Chief Justice in an earlier part of his judgment, that the object of the 54th section was to enable the annuity creditor of a bankrupt to prove for the value of an annuity, under a commission against the grantor; and further, to explain the following statement, which might appear to be an important qualification of that position, that the defendant, in that case, neither granted the annuity, nor covenanted absolutely for its payment. For, without going so far as to decide that in no case could the value of an annuity be proved against the estate of one who is not an original grantor, I have no hesitation in declaring my opinion, that where it is the manifest intention of the parties, upon the face of the contract, that the bankrupt should only be responsible as surety upon the default of the grantor, that the grantee ought not to be permitted to prove the value of the annuity against the surety, although there may be in

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the deed a covenant for its payment, in its form absolute and unconditional. For, in construing such a covenant, the Court must collect the intention of the parties from the tenor of the whole contract. Now, what is the effect of the covenant and proviso, taken together, with reference to the other provisions of the deed? Is it not, substantially, to convert into a conditional undertaking the covenant which was in its form absolute and unconditional; for the restraint upon the remedies against the surety is, in substance, a co-extensive limit to his liability. It is true, as was suggested by Mr. *Forster* in his argument, that the form of the covenant, being joint as well as several, would have prevented the bankrupt from pleading the proviso as a defeasance in bar to any action at law, brought without notice or demand, or within the limited period after demand, and might have left him at law to his counter remedy for the breach of that condition; but as that remedy would have entitled him, as I conceive, to damages co-extensive with those recovered from him on his covenant, the substantial result would have been the same as a mere contingent covenant in the form adopted in other cases. But if there were no remedy at law, surely a court of equity would have restrained the grantee from suing out execution upon a proceeding at law, contrary to the obvious expressed intention of all parties, that the surety's liability should, notwithstanding the absolute form of the covenant, be contingent upon notice of the default of the grantor, and demand of payment from the surety; and therefore it appears to me, that, according to the principle laid down by the judges in the case of *Shuckermore v. Thistleton*(a), it would not be a consistent or just con-

(a) 6 M. & S. 12.

struction of this instrument, which would have the effect of making the estate of the bankrupt liable for the value of the annuity, in the same way as it would have been, if he had been the grantor of the annuity, and had made an absolute and unqualified contract for its payment; and therefore, as Sir *George Rose* retains the opinion expressed by him at the time of the argument, and as the perusal of the deed has brought the mind of my other learned colleague to the same conclusion, the proof must be expunged.

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Sir JOHN CROSS.—At the close of the argument on the hearing of this petition, I was doubtful whether the decision of the case should be governed by *Baxter v. Nicholls* (a), or *Ex parte Thompson* (b); and I thought I could not form any judicial opinion, until I had examined carefully the annuity deed and the warrant of attorney, as well as the authorities that were cited in the argument. Having now done so, it appears to me, that the doctrine as to the relation of principal and surety, which unquestionably existed between these parties, is not enough to determine this question; for a surety may make himself responsible as a principal, as in *Baxter v. Nicholls*. On referring to the deed in this case, there is an express joint and several covenant to pay the annuity. If the matter had stopped there, I should have thought that this case must be governed by *Baxter v. Nicholls*, and that the value of the annuity was provable under the fiat against *Colnaghi*. But when I go on and read the proviso, which declares that no proceeding shall be taken to compel the payment of the annuity by *Colnaghi*, unless twenty-one days notice in writing is given to him of

(a) 4 Taunt. 90.

(b) 2 Deac. & C. 126.

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any default by *Coindet* in the payment of it; I think the proviso must be coupled with the covenant, and that the bankrupt cannot be considered liable, until the default of the grantor, and notice given of such default. Then, on looking at the warrant of attorney, in pursuance of which judgment has been entered up, the defeazance provides that execution should not issue against *Colnaghi*, unless the annuity should be in arrear for forty days, and twenty-one days notice in writing of such arrear had been given to *Colnaghi*. This, therefore, confirms me in my belief, that the bankrupt cannot be held liable for the payment of the annuity, until after the default of the grantor, and that consequently this case must be governed by that of *Ex parte Thompson*. With respect to the argument, that the proviso would not prevent an action on the covenant, the answer is, that the defendant might craveoyer of the deed, and set forth the proviso, and then aver that there had been no notice given to him of any default, nor any demand of payment, which would entitle the defendant to judgment in his favour, unless the plaintiff could dispute the fact. I therefore agree in opinion that the proof must be expunged.

The ORDER was, that the proof should be expunged, without costs as against the annuity creditor; and that the assignees should have their costs out of the estate.





Ex parte SAMUEL BIGNOLD and others.—In the matter  
of THOMAS THEOBALD.

1838.

Gray's Inn  
Hall, March 14  
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**THIS** was the petition of the secretary, and four of the directors and trustees, of the Norwich Union Life Insurance Company, praying for the sale of certain real and personal property, on which the company had both a legal and equitable mortgage.

By indenture bearing date the 21st August 1835, the bankrupt, in consideration of 8000*l.* advanced by the company, granted and released to *Bignold* and his heirs certain freehold property, for securing the repayment of that sum and interest. And it was provided, that if the bankrupt should duly pay the interest on the said sum of 8000*l.* on the days and times in the indenture mentioned within two calendar months after such days of payment, then that *Bignold* would not call in or require payment of the mortgage money, until the expiration of five years from the date of the indenture, nor would commence any proceedings at law or in equity, to enforce the payment of the said principal sum, or to obtain possession of the premises.

By an agreement bearing even date with this indenture of mortgage, made between the bankrupt of the one part, and *Bignold*, as secretary of the company, of the other part, after reciting that the bankrupt was possessed of twelve shares in the capital stock of the Norwich Union Fire Insurance Society, and in order better to secure the said sum of 8000*l.* in the said indenture of mortgage mentioned, the bankrupt had deposited with *Bignold* the certificates of the said shares, it was agreed and declared by and on the part of the bankrupt, that the said certificates should be and remain with *Bignold* by way of

The bankrupt executed a mortgage, with a power of sale, subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid: *Held*, that the mortgagee might have the common order for sale, with liberty to prove for the residue.

Where the same person is secretary to two insurance companies, *quære*, whether his knowledge of a deposit of shares, acquired by him as secretary to one of the companies, amounts to notice to the other, so as to prevent the operation of the clause of reputed ownership.

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pledge as an additional security for the said sum of 8000*l.* and interest; and that the bankrupt would at any time thereafter, whilst the said sum and interest or any part thereof should remain unliquidated, assign or transfer the shares to *Bignold*, or to such other person as the directors for the time being of the Norwich Union Life Insurance Society, or a requisite number of them should direct, to render the same a more efficient security to the society. And a power of sale of the shares was given in the same terms, as that contained in the indenture of mortgage.

The petition alleged, that *Bignold* was at the date of the agreement, and still continued one of the secretaries of the Norwich Union Fire Insurance Society, and that consequently the society had immediate notice of the deposit of the shares, so as to take them out of the reputed ownership of the bankrupt.

The fiat issued on the 9th November 1837.

The prayer was, that the petitioners might be declared to be entitled, notwithstanding the covenant contained in the indenture of mortgage, to have the property comprised therein sold and made available towards satisfaction of the said sum of 8000*l.*; or otherwise to an immediate right of proof for that sum, without relinquishing the benefit of the mortgage; and that the petitioners might be declared equitable mortgagees of the shares specified in the agreement, with the usual order for the sale of such shares.

It appeared, from the affidavits, that there were in Norwich two distinct companies, one called the "Norwich Union Life Insurance Company," and the other the "Norwich Union Fire Insurance Society;" that *Bignold* was secretary to both, and that a Mr. *Taylor*

was joint secretary with him to the Fire Insurance Company; and that *Bignold* and his partner were joint solicitors, with Mr. *Unthank*, of the Fire Insurance Company; that the transfers of deeds relating to shares in the Fire Insurance Company were prepared at the office of *Bignold* and his partners; that a certificate was granted to the original proprietor of each share in the Fire Insurance Company, and when any change of ownership took place, the certificates were brought to *Bignold's* office, whereupon the necessary deed to accomplish the purpose was prepared, and was sent with the certificates of the shares to the office of the company, to be laid before a board of directors for their approval of the newly proposed proprietor; and if approved, to have a memorandum written on the certificate of the deed executed by such proposed proprietor, signed by three of the directors; and that whenever the new proprietor was accepted, the deed was retained at the office, and the certificates were returned to the solicitor's office, to be delivered to the persons entitled to them; and that the certificate was the only document, which a proprietor of shares held as evidence of his proprietorship. It was sworn by *Bignold's* partner, that the fourteen certificates of the bankrupt's shares had been, from the time of the deposit thereof with the Life Insurance Company, in the possession of the solicitors; and that no sale or transfer of them could have been effected by the bankrupt, without the possession of the certificates and the knowledge of the solicitors.

In opposition to the petition, it was sworn by Mr. *Taylor*, the joint secretary with Mr. *Bignold* of the Fire Insurance Society, that the deed, under which the society was established, required notice to be given at the office of the society of all contracts for the sale of shares, and

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that all transfers of shares should be deposited in the company's office; that all the shares in question, of which the bankrupt was an original proprietor, continued registered in his name in the books of the company up to the time of his bankruptcy, and that the dividends thereon were, up to that time, regularly paid to him as the proprietor; that no notice was ever given to Mr. *Taylor*, as one of the secretaries of the company, of any transfer or mortgage of the shares, nor was any such notice given to the board of directors, or left at the office of the company; and that nothing appeared upon the register of shares to create any doubt that the bankrupt was not the absolute *bonâ fide* proprietor of the shares, or that they were subject to any mortgage or charge whatever; that *Bignold* never informed *Taylor*, or the board of directors of the fire office, of the contract made by the bankrupt for mortgaging the shares, and that *Taylor* was wholly ignorant of any such contract until after the bankruptcy; and he averred his belief that the knowledge of such contract was acquired by *Bignold* in his character of secretary to the *Life Insurance Company*, and not as one of the secretaries of the *Fire* office.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition, cited *Ex parte Waithman* (a); where the bankrupt, being one of the directors of a life assurance office, deposited a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office; and it was held, that this was sufficient notice to the office, of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership.

(a) 4 Deac. & C. 412.

Mr. *Cooke*, *contra*. There are two questions in this case for the consideration of the Court: 1st, As to the right of the petitioner to call for a sale of the property contained in the mortgage deed; 2d, Whether the shares in the fire office were not in the reputed ownership of the bankrupt at the time of his bankruptcy.

1st. As to the right of the petitioner to call for a sale of the property contained in the mortgage deed. It will be observed, that the deed itself provides expressly, that *Bignold* would not commence any proceedings to enforce the payment of the mortgage money, or to obtain possession of the property mortgaged, until the expiration of five years, unless default should be made in the payment of the interest. Now, as no default was made by the bankrupt in the payment of the interest before his bankruptcy, this Court has no power to order a sale.

Then as to the 2d question, the right of property in the shares of the Norwich Fire Office. The deed, by which the company was established, requires the consent of the directors, to render any transfer of shares valid, and notice of the transfer to be given to the society. Now, in this case, no notice whatever was given to the society of the transfer of the shares, nor was any entry of such transfer made by *Bignold* in the books of the office. The shares continued to stand in the name of the bankrupt, and he received the dividends on the shares up to the very period of his bankruptcy. The shares must be taken, therefore, to have been in the reputed ownership of the bankrupt at the time of his bankruptcy. In *Williams v. Thorpe (a)*, where a bankrupt had absolutely assigned a policy of life insurance, but had given no notice to the office, it was held, that his assignees were

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(a) 2 Sim. 237.

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entitled to it. Here the certificates were deposited only by way of equitable mortgage.

Mr. *Swanston*, in reply. In *Smith v. Smith* (a), notice was inferred, from one of the trustees having a private conversation with one of the parties relative to the transaction. Here *Bignold* was one of the officers of the company; and notice to any person officially concerned, is all that is necessary.

ERSKINE, C. J.—There are two questions in this case; 1st, As to the legal mortgage of the real property; 2d, As to the deposit of the shares. As to the first question,—the objection of the assignees to a sale of the real estate rests on a covenant in the mortgage deed not to call in the mortgage money for five years, if the mortgagor should continue to pay the interest regularly; and it is urged, that as the mortgagee could not enforce the power of sale, if no bankruptcy had intervened, so now he cannot call upon this Court to order a sale. It is true, that the mortgagee could not himself act under the power of sale; but he comes here as a creditor, seeking to prove his debt; and the ordinary way of proceeding, when a mortgagee applies to prove, is, to have a sale of the mortgaged property, in order to ascertain the value of it; for he cannot prove, until he has either realized his security, or given it up. The assignees oppose the sale of the property, until default is made in the payment of the interest; although the very bankruptcy of the mortgagor prevents the payment of the interest. Before the bankruptcy, the petitioner had the responsibility of the bankrupt, and of his estate; but, the bank-

(a) 1 Crompt. & M. 231; 4 Tyrw. 32.

rupt's responsibility is lost, by the bankrupt obtaining his certificate ; notwithstanding which, the assignees insist, that the petitioner shall be bound strictly by the covenant in the mortgage deed. The object of a sale is to furnish the best evidence of the value of the property ; and I think the petitioner is entitled to an order on that part of his petition.

As to the 2d point, namely, the sale of the shares in the fire office,—there seems to be some difficulty, on account of the decision in *Ex parte Burbridge* (a), in the matter of *Kidder* ; because, according to the doctrine there held, the transaction with *Bignold* can scarcely be considered as notice to the Norwich Fire Office. The necessity of notice in these cases rests on two grounds ; 1st, That the equitable transfer of a chose in action is incomplete, without notice ; 2d, That without such notice, the property is in the reputed ownership of the bankrupt. In the case of shares in public companies, notice is more essential, inasmuch as the bankrupt's name appears on the books as owner, and would enable him to procure credit, on the faith that the property was his own. In the present case, the bankrupt might have transferred the shares in question to other parties, by which the directors of the office, not having received notice of the deposit with *Bignold*, might be innocently parties to a fraud. It is contended, that because *Bignold* is secretary both of the Fire and the Life Assurance Offices, that the notice here is sufficient ; but there is a distinction between express notice given to a public officer, and his mere knowledge of the fact, derived from some other channel. If the interference of *Bignold*, as secretary of the fire office, had been necessary, either

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(a) 1 Deac. 131.

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for receiving the dividends, or for any other purpose, then it might have been said, that the knowledge of *Bignold*, such as it was, was equivalent to notice to the company; but there is nothing in the deed of incorporation, or in the rules of the Fire Insurance Company, which make the interference of the secretary necessary; and even if that were so, yet as there were actually two secretaries, the interference of *Bignold* would not have been indispensable. I am not upholding the absurdity of *Bignold* giving notice to *Bignold*; but if regular notice had been given to him as secretary of the Fire Insurance Company, he ought to have given notice to the directors of that office, to prevent them from transferring the shares to other persons. There was no official entry made by *Bignold* in the books of the fire office, which it would have been his duty to have done, if he had received notice in his official capacity. It appears to me, therefore, that the notice is not sufficient, according to the decision in *Ex parte Burbridge (a)*, where Lord Commissioner *Shadwell* observes, that the private knowledge which one of the directors had of the transaction in that case, could not operate as notice to the company, who treated the bankrupt as the owner; and he dwells on the great hardship that such a delusive credit would occasion to the public.

Sir JOHN CROSS.—It has been frequently decided, in cases of this description, that some kind of notice is necessary; but the law has nowhere said, what that notice shall be, or to whom it shall be given; the validity of the notice, therefore, must be determined according to the circumstances of each case. In the present case,

(a) 1 Deac. 131.



the deposit of the shares was perfectly known to *Big-nold*, who was secretary to both these companies. But a distinction has been taken between knowledge and notice. In the case of an indorser of a bill of exchange, where it is necessary to give him notice of its dishonour, it is not sufficient to show that he knew of the fact; but formal notice must be given, in order to make him responsible to the holder. And if in a case like the present, the law had said that such a notice must be given, as would make a party responsible, then the distinction between knowledge and notice might apply to this case; but here no transfer of the shares could be made, without the production of the certificates, and these were not in the possession of the bankrupt, but of one of the secretaries of the fire office. It seems to me, therefore, that the facts here amount to a sufficient notice to satisfy the exigency of the decided cases, which require *some* notice, without specifying the form or manner of the notice. As to the other point, namely, whether the petitioners are prevented by the proviso in the mortgage deed from asking for a sale before the end of five years, the answer is, that if the assignees are to stand in the place of the bankrupt, and insist upon the benefit of that covenant, they must undertake to pay the interest regularly, and the whole of the principal at the end of the five years. For it would be unjust, that the petitioners should lose both the personal security of the bankrupt, and be kept out of the estate for five years, when it may become of far less value than it is at present. I think, therefore, that the petitioners have a right to call for an immediate sale of the property, and to prove for the residue of their debt.

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Sir GEORGE ROSE.—There can be no question as to the order for the sale of the real estate. With respect to the shares, the proper course will be to include them also in the order for sale, but reserving a right to the assignees to enforce their claim to the proceeds. There does not, certainly, appear to have been sufficient notice given in this case, according to the decision in the matter of *Kidder*; but if it had not been for that case, I should have said, that the notice was here sufficient. The Order, therefore, must be considered as not precluding the assignees from claiming the proceeds of the shares, if they think proper to raise that question.

The ORDER was, that the real estate, and also the shares, should be sold, the petitioners undertaking not to set up the Order as an objection to any claim which the assignees might think right to make, with respect to the proceeds of the shares.

Ex parte JOSEPH RALEIGH and others.—In the matter of LAWRENCE ROSTRON, JOHN ROSTRON, and JAMES ROSTRON.

Gray's Inn  
Hall,  
Mar. 15, 1838.

*L.*, one of three partners, contracts to sell to *D.* 100 shares in a joint stock bank, which were standing in the name of

THIS was a petition of the assignees for an order to expunge the proof of a debt, against the separate estate of *L. Rostron*.

The bankrupts, previous to the year 1835, opened an *J.*, one of *L.*'s partners, but which were, in fact, the property of the firm, and agrees, in consideration of *D.* accepting a bill for the amount of the purchase-money, drawn in the name of the firm, to cause the shares to be duly transferred to *D.* The bill is negotiated by *L. & Co.*, who become bankrupt before application can be made to the bank to transfer the shares to *D.*, when the bank refuse to make the transfer, claiming a lien on the shares for their own advances. Held, that *D.* could not prove against the separate estate of *L.* for money had and received, but only against the joint estate of *L. & Co.*

account with the Manchester and Liverpool District Bank, in which each of the bankrupts had 100 transferable shares, which were allotted and appropriated to them upon the formation of the bank. Upon such allotment, each of the bankrupts signed, and gave to the banking company, a memorandum in writing, whereby it was declared, that the bank should have a lien upon the shares so severally allotted to them, for the amount of the balance which might for the time being be due and owing to the bank by the bankrupts' firm, in respect of any advances made to the firm by the bank. The petition alleged, that although the allotments of 100 shares had been made by the banking company to each of the bankrupts separately, and in their individual characters, and although each allotment of the 100 shares was supposed to be the private property of the individual copartner, in whose name they stood; yet the whole of the 200 shares were, in point of fact, and as between the bankrupts themselves, understood and considered to be the partnership property; and that, upon taking stock, the whole of the shares were uniformly included, and treated by the partners as part of the stock belonging to the firm.

In the spring of the year 1835, *James Rostron* went to New York, for the purposes of the business, leaving with his brother, *L. Rostron*, a letter, authorising him to sell and transfer the 100 shares in the stock of the bank, standing in the name of *J. Rostron*.

After the departure of *J. Rostron*, *L. Rostron* inquired of the bank, whether they would be willing to transfer the shares to a purchaser on the authority of this letter, in case he should sell them for his brother, and was informed that the bank would require a power of attorney

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on a proper stamp from *J. Rostron*, authorising some one to make such transfer on his behalf.

On the 3rd September 1835, Messrs. *Duncan* entered into a contract with *L. Rostron*, by *Thomas Cardwell*, as their agent, to purchase the 100 shares of *J. Rostron*, for the sum of 2150*l.*; and they also at the same time agreed to accept a bill of exchange for the amount, to be drawn upon them by the firm of *Rostron*, brothers, payable six months after date; on condition that *L. Rostron* should give his undertaking, that he would cause the shares to be duly transferred to them.

The petition alleged, that at the time when this contract was entered into, Messrs. *Duncan*, as well as their agent *Thomas Cardwell*, had been informed, and well knew and understood, that the 100 shares so sold were the 100 shares standing in the name of *James Rostron*, in the books of the bank.

In pursuance of this contract of sale, a bill of exchange was drawn by *Rostron*, brothers, upon and accepted by Messrs *John and Peter Duncan*, for the sum of 2203*l.* 15*s.*, and *L. Rostron* signed the following undertaking:—

“ Manchester, 15th September, 1835.

“ I, *Lawrence Rostron*, do hereby agree and engage, in consideration of having received *John and Peter Duncan*'s acceptance of *Rostron*, brothers, draft, dated 5th September, at six months, for 2203*l.* 15*s.* 6*d.*, to cause to be transferred and delivered over to *J. and P. Duncan*, or to any other person whom they may appoint, 100 shares in the Manchester and Liverpool District Bank, now standing in the name of *James Rostron*, of Edenfield, when required; I declare the said bill of 2203*l.* 15*s.* 6*d.*, when paid, to be in full of said shares.

“ Witness, *Thomas Cardwell*.

*Lawrence Rostron.*”

The bill for 2203*l.* 15*s.* 6*d.* was negotiated by the firm of *Rostron*, brothers; and *L. Rostron*, shortly after

the time of the sale, sent a power of attorney to New York, for the signature of *James Rostron*, which was afterwards returned to this country, duly executed; but before it was so returned, and before the bill became due, the firm of *Rostron*, brothers, had stopped payment.

On the 22d January 1836, a fiat in bankruptcy issued against *L. Rostron* and *John Rostron*; and, on the 3d March 1837, when *James Rostron* had returned from America, a separate fiat was issued against him, which was annexed to, and formed part of, the first fiat, pursuant to the provisions of the 6 Geo. 4. c. 16. s. 17.

The petition alleged, that, during the interval between the giving of the undertaking of the 15th September 1835 and the issuing of the first fiat, Messrs. *Duncan* never applied to *L. Rostron* to transfer the shares in the bank, standing in the name of *James Rostron*. On the 8th March 1836, the bill for 2203*l.* 15*s.* 6*d.* became due, which Messrs. *Duncan* were obliged to pay; and, having then received the power of attorney duly executed by *James Rostron*, they applied to the bank to transfer to them the 100 shares standing in his name, which the bank refused, claiming a lien on the shares for the balance due to them from the firm of the bankrupts. The bank proved for the full amount of their debt against the joint estate, without deducting the value of the 100 shares; Messrs. *Duncan* also proved for the sum of 2203*l.* 15*s.* 6*d.* against the separate estate of *L. Rostron*, as for so much money had and received by *L. Rostron*, and paid by Messrs. *Duncan* to his use, excepting the agreement of the 15th September 1835, as a security. This last-mentioned proof the assignees now sought to expunge, on the ground that the debt

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was founded solely on the written undertaking of the 15th September 1835, and was not proveable against the separate estate of *L. Rostron*.

*Mr. Swanston*, and *Mr. Mylne*, having appeared in support of the petition, the Court called on

*Mr. Anderdon*, and *Mr. Bacon*, *contrà*. Messrs. *Duncan* had no reason to suppose, that these shares were the joint property of the bankrupts. Prior to the bankruptcy, they made application to *L. Rostron* to transfer the shares. [*Erskine*, C. J. The question is, whether the claim is not for unliquidated damages, and therefore incapable of proof.] It was an absolute contract, on the part of *L. Rostron*, to transfer the shares to Messrs. *Duncan*. We did not deal with *L. Rostron*, as the agent of *James Rostron*; but, on the contrary, our affidavits show that *L. Rostron* always admitted his individual responsibility. The shares were standing in the name of *James Rostron*; and Messrs. *Duncan* swear, that, at the time of the contract for the sale of them, they said they would have nothing to do with *James Rostron*, and insisted upon the personal undertaking of *L. Rostron* to transfer them, having no communication whatever with *James Rostron*, nor entering into any contract with the firm of *Rostron*, brothers. The relation of buyer and seller was solely between Messrs. *Duncan* and *L. Rostron*; and if there is no proof against his estate, there can be no proof against any other estate. It is sworn, that several applications were made by Messrs. *Duncan* for the transfer of the shares, before the bankruptcy of the *Rostrons*. [*Sir G. Rose*. The difficulty here is, that the money did not come to *L. Rostron* on

his own account, but as a partner in the firm of *Rostron, brothers.*] There was a failure to perform the contract, before the bankruptcy, on the part of *L. Rostron*; the contract therefore was rescinded, and resolved itself into a pecuniary demand against him on the bill of exchange. [*Erskine, C. J.* The difficulty I feel is, that the contract was not rescinded before the bankruptcy.] [Sir *J. Cross.* You contracted with *L. Rostron* for the purchase of the shares, when you knew the fact, that the shares could not be transferred without a power of attorney from *James Rostron*; and now you say, that when you demanded the transfer, before the power of attorney could be obtained, you had immediately a right to demand the amount of the bill of exchange from *L. Rostron.*] Because *L. Rostron* received the amount of the bill for his own benefit, the bill having been paid into the Manchester and Liverpool District Bank by *L. Rostron* in the name of the firm, and the money afterwards drawn out by him. [*Erskine, C. J.* The difficulty of the proposition you have to establish is, that a liability for damages forms a proveable debt.] In *Van Sandau v. Corsbie* (a) it was held, that the consequential damage accruing from the nonpayment by the bankrupt of an original debt, was proveable under his commission; and therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar to the action. And the same principle was acted upon by this Court in *Ex parte Myers* (b).

(a) 3 B. &amp; Ald. 13.

(b) 2 Deac. &amp; C. 251.

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Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The party, who has proved in this case against the separate estate of *L. Rostron*, seems to have proved upon the only plausible ground, namely, for money had and received by *L. Rostron* for the use of Messrs. *Duncan*. But on looking at all the facts of the case, and considering the agreement of the 15th September 1835, it seems to me, that the *Duncans* cannot substantiate their claim for money had and received by *L. Rostron*. It appears from the affidavits, that the shares were in fact the joint property of the firm of *Rostron*, brothers, though standing in the name of *James Rostron* at the bank; that this fact was explained to the *Duncans* at the time of the contract of sale, and that they then said they would have the personal responsibility of *L. Rostron*. Accordingly, Messrs. *Duncan* retain possession of their acceptance for the amount of the purchase money, until the undertaking of *L. Rostron* is given. Now, certainly, it must be admitted, that this was his own personal engagement. But what was that engagement? Nothing more than this—if you will pay the firm the amount of your acceptance for 2203*l.* 15*s.* 6*d.*, I will cause the shares to be transferred to you. As it appears, therefore, from the terms of the agreement, that the bill in question was payable to *Rostron*, brothers, and as it is sworn in the affidavits, that the bill was paid into the bank on account of *Rostron*, brothers, the money had and received, as the proceeds of this bill, was money had and received for the use of the firm of the bankrupts, and not for the separate use of *L. Rostron*. It is said, however, that *L. Rostron* was individually liable to Messrs. *Duncan* on his undertaking.



But then, was he by reason of this undertaking, at the time of his bankruptcy, indebted to the *Duncans* in any sum of money; or was the money paid to the firm of the bankrupts, for the separate use of *L. Rostron*? Even supposing the fact to be so, what debt at the time of the bankruptcy could be claimed by Messrs. *Duncan* against *L. Rostron*, when they had not paid the bill? There would be, in my opinion, a right of action by Messrs. *Duncan* against *L. Rostron*, for not causing the shares to be transferred to them, pursuant to his contract; but if they go in and prove against the joint estate, which is the only right of proof they have for the amount of the bill, they rescind the contract for the sale of the shares. Inasmuch, therefore, as their claim against *L. Rostron* sounds only in damages, it appears to me, that the proof against his estate cannot be sustained.

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Sir JOHN CROSS.—*Duncan & Co.* say, that *L. Rostron* was indebted to them for so much money had and received by him for their use before the time of the bankruptcy, by virtue of his contract with them of the 15th September 1835. But was that a contract for the payment of a debt? Nothing like it; the contract was, to cause and procure *James Rostron* to transfer the shares in the bank to Messrs. *Duncan*, that were standing in *James Rostron*'s name. The agreement seems to have been entered into by both parties, on the understanding that *James Rostron* would transfer the shares. If he did not, an action at law would lie by Messrs. *Duncan* against *L. Rostron*. For what? not for a debt; but for damages, for not causing *James Rostron* to transfer the shares. It was quite clear, from the terms of the contract, that Messrs. *Duncan* would be compelled

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to wait for a transfer, until a power of attorney was given by *James Rostron* to make such transfer. It is then contended, that the contract was rescinded by the failure of *L. Rostron* to perform it. But we have no evidence whatever of any rescinding of the contract. If indeed the Messrs. *Duncan* had applied to *L. Rostron* to cause the shares to be transferred, and upon his failing to do so, they had said they would have nothing more to do with the bargain, they might possibly then have had a right to say, "we will have our money back again." But instead of rescinding the contract, they go repeatedly to *L. Rostron*, to require the performance of it, by transferring the shares; and this almost down to the time of the bankruptcy. The *Duncans* therefore have no claim against *L. Rostron*, except for a breach of contract, which was not rescinded before the bankruptcy. Whether any debt is proveable by them against the firm of the bankrupts, I give no opinion.

Sir GEORGE ROSE.—The insuperable objection to this proof is, that the circumstances of the case do not come up to what the counsel for the respondents have endeavoured to show. The essential question is this—to whose use was the sum of £203*l.* had and received? I take it as a fact, that every sixpence of it was paid to the firm of *Rostron*, brothers, and received for the use of the joint estate. Another ground contended for on the part of the respondents is, that although the bill was drawn in the name of the firm of the bankrupts, the transaction was wholly for the benefit of *L. Rostron*. But the evidence before us is, that throughout the whole of the transaction, *L. Rostron* was acting as the agent of his partners, and for the benefit of the partnership only.

Before I admit a proof against any estate, I must see what benefit the estate has derived from the transaction, on which the right of proof is claimed. Now, the only benefit, that has accrued from the contract of *L. Rostron* with Messrs. *Duncan*, has accrued to the joint estate of *Rostron*, brothers,—and therefore it appears to me, that the proof can only be made against the joint estate.

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The ORDER was, that the proof against the separate estate of *L. Rostron* should be expunged, with liberty to the respondents to go before the Commissioner, and make such proof as they could establish against the joint estate.

Ex parte JEAN PAULI and JEAN BAPTISTE CLAUS.—

In the matter of JAMES HENRY TRYE and SAMUEL LIGHTFOOT.

Gray's Inn  
Hall, March 15,  
1838.

THIS was a petition for an Order to declare that the petitioners were entitled to the proceeds of certain bills of exchange, under the following circumstances stated in the petition :

The bankrupts had carried on the business of dealers in bullion and foreign exchanges, and they were also bill and money agents. The petitioners were bankers at Ghent, in the kingdom of Belgium, and were in the habit of transmitting to the bankrupts, as their factors and agents in London, foreign bills of exchange, with instructions as to the mode in which such bills were to

A foreign merchant remits bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds. The factor sells the bills, but, before the receipt of the purchase money, becomes bankrupt, and dishonours the merchants' drafts for the amount. *Held*,

that the merchant, and not the factor's assignees, were entitled to the proceeds of the bills, notwithstanding the bills had been indorsed both by the principal and the factor, and were sold by the factor in his own name.

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be disposed of, and in which the proceeds were to be applied. The sale in London of foreign bills of exchange usually takes place on foreign post days, and it is the custom of merchants, not to pay the purchase-money until the foreign post day next after the day of sale. The bankrupts did not receive from the petitioners a *del credere* commission, nor did they take upon themselves any liability, in the case of non-payment of the purchase-money in respect of such bills; but they were accustomed, as soon as a sale of bills was effected, to inform the petitioners of the names of the purchasers.

On the 22d March, the petitioners remitted the bankrupts four bills on Frankfort, in a letter addressed to them, "requiring them to negotiate the same as advantageous as possible," to the credit of the petitioner; at the same time, advising them of having drawn on them for 450*l.* at seven days' sight. This remittance reached the bankrupts on the 24th March; but that day being Good Friday, there was no opportunity of selling the bills till the next foreign post day, viz. on Tuesday the 28th March. The bankrupts, however, acknowledged the receipt of the remittance, by a letter of the 24th March addressed to the petitioners, in which they informed them, that they would "negociate the bills at the most favorable event," and promised to honor the bill drawn on them for 450*l.*

On the 25th March, the petitioners remitted the bankrupts a bill on London for 167*l.*, and drew on them various bills, amounting to 661*l.*

On the 28th March, the bankrupts sold the four bills on Frankfort to *Nathan Meyer Rothschild & Co.* of London, for the sum of 818*l.* 12*s.* 6*d.*, which sum was,

according to the before mentioned custom, payable on the next foreign post day, the 31st March.

On the 30th March, the bankrupts stopped payment ; and on the 20th April, the fiat issued.

It appeared, that the bankrupts had omitted, previous to the sale of the bills, to inform *Rothschild & Co.* that the bankrupts were merely the factors for the petitioners ; but notice of that fact was given to *Rothschild & Co.*, immediately on the bankrupts stopping payment.

In consequence of the bankruptcy of *Trye & Lightfoot*, the purchase-money for the bills was not paid by *Rothschild & Co.* ; and they claimed a lien on the purchase-money, to the amount of 503*l.* 12*s.*, in respect of another parcel of bills previously purchased by them of the bankrupts, in which, however, the petitioners were in no way concerned.

The petitioners alleged, that they remitted the four bills thus sold by the bankrupts, in order that the proceeds of the sale of them might be applied for the specific purpose of meeting the bill for 450*l.*, and the bills amounting to 661*l.* ; none of which had been accepted or paid by the bankrupts.

Under these circumstances, the petitioners claimed the proceeds of the four bills, as against the assignees of the bankrupts. For the purpose of saving expense, it was agreed between all the parties, that the balance of the purchase-money for the bills, after deducting the amount of the lien claimed by *Rothschild & Co.*, and the bills in respect of which such lien was claimed, should be paid and delivered by them to the official assignee ; and that the same should be placed by him in the Bank of England, to a separate account, subject to the order of the Court on the present petition. Accordingly, this

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balance, amounting, with interest, to the sum of 331*l.* 8*s.* 10*d.*, was paid into the bank ; and the petitioners now prayed, that the official assignee might be ordered to pay it over to them.

Mr. *Swanston*, and Mr. *Ellis*, in support of the petition, referred to the case of *Jombart v. Woollett* (a) ; where, foreign merchants having remitted bills to their London agents, and there being nothing from the correspondence to show that the latter were authorized to deal with them as their own, but that the only obligation of the foreign house was to keep the agents in cash to meet the bills when due, it was held, that, the bills not having been discounted nor disposed of, there was nothing to displace the title of the remitters, and that they did not pass to the assignees of the agent, on his bankruptcy. They also cited *Scott v. Surman* (b) ; where it was held, that if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received.

Mr. *Bethell*, and Mr. *L. Wigram*, *contrà*. The petitioners here remit the bills to the bankrupts, with directions to sell them ; this, therefore, is not the ordinary case of a deposit of bills with a banker up to the time of his bankruptcy, but as if so much goods had been sent to a factor for sale. When bills are paid into a banker's, they are for the purpose of being received by him at the time of maturity, and the agency continues until that event takes place ; but here the agency of the bankrupts was to sell,

(a) 2 Myl. & Cr. 389.

(b) Willes, 400.

and the agency, therefore, terminated as soon as the sale took place. In *Ex parte Pease* (a), Lord Eldon says, "It ought to be generally known, that if bills indorsed are remitted to bankers, they may dispose of them effectually, though contrary to the faith of the understanding between the parties; and the remitters can only come in as general creditors,—this is settled doctrine." In the present case it appears, that the bills were indorsed by the petitioners; and when the bills were sold, conformably to the directions of the principal, and the bankrupts had given credit for the amount to the petitioners, the agency ceased. [Sir John Cross referred to the case of *George v. Clagett* (b), where it was held, that if a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal.] The course of dealing between the parties in the present case was, that directly any bills were sold by the bankrupts, the petitioners might draw for the amount. The bills, therefore, must be considered as treated as cash; and it is clear, that even short bills paid into a banker's, if treated as cash, are not recoverable by the principal, on the bankruptcy of the banker; *Ex parte Sergeant* (c). There really appear to be only two questions in the case: 1st, Had the bankrupts authority to make the bills their own? and 2dly, Have they done so? That they had authority to make the bills their own, is shown by the petitioners having indorsed them; and it is shown, that the bankrupts actually made the bills their own, when they nego-

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(a) 1 Rose, 232; 19 Ves. 25.

(c) 1 Rose, 153.

(b) 7 T. R. 354.

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ciated them; for they indorsed them to *Rothschild & Co.*, and that is a clear act of ownership. As soon, therefore, as ever the bankrupts sold the bills, they became the owners of the proceeds.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—This case has been argued before us, on the part of the respondents, on two grounds : 1st, That the bills were the actual property of the bankrupts ; and 2dly, That they were the reputed owners of them. The first question, however, is clearly got rid of by the case of *Scott v. Surman (a)*; which decides, that where goods sold by a factor are not paid for at the time of his bankruptcy, the proceeds do not belong to his assignees, but to the principal. But it is contended here, that the circumstances of this case distinguish it from those cited in support of the petition. The only circumstance, however, that has been relied on is, that when the factors in this case sold the bills, they entered the amount of the price in their books, to the credit of the petitioners, who had directly the right of drawing on them for the amount. But that does not change the contract of the parties, nor deprive the principal of his rights against the purchaser. It is then urged, that the circumstance of the bills having been indorsed in the name of the bankrupts proves, that they were the owners, or reputed owners of them. But in a case cited in *Scott v. Surman* it was held, that, although goods were sold by a factor in his own name, yet that did not vary the rights of the principal. It appears to me, therefore, that the petitioners are fully entitled to the proceeds of these bills.

(a) *Willes*, 400.



Sir JOHN CROSS.—I am of the same opinion. It is a strange mode of arguing, to contend, that directly the bills were sold by the bankrupts, the proceeds became their property; although it is admitted, that the moment before, the bills were the property of the petitioners. It seems to me, that the money arising from the sale of the bills, as long as it remained in the hands of *Rothschild & Co.*, was the money of the petitioners.

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Sir GEORGE ROSE concurred.

The ORDER was, that the sum of 331*l.* 8*s.* should be paid over by the official assignee to the petitioners, and that the bills which had been delivered up to him by *Rothschild & Co.*, in respect of their lien, should be also handed over to the petitioners. Costs of both parties out of the estate.

Ex parte FOSTER.—In the matter of FOSTER.

Gray's Inn  
Hall,  
March 16,  
April 19, and  
May 7, 1838.

THIS was a petition of the bankrupt to annul the fiat, on the ground that he had committed no act of bankruptcy. No affidavit had been filed by the assignees in support of the fiat; but they relied on the act of bankruptcy, as stated in the proceedings before the Commissioners. The bankrupt had been furnished with no fiat in this respect, will either order further affidavits to be made, or a *vidé voce* examination. But, if no act of bankruptcy appears on the proceedings, the bankrupt is entitled to have the fiat annulled.

Where a *vidé voce* examination is ordered, as to the act of bankruptcy, the assignees must give notice of what act of bankruptcy they rely on; but they are not bound to furnish a list of witnesses.

On a *bond fide* petition of the bankrupt to annul, the Court will let him see the proceedings, or order him to be provided with copies of the depositions; *aliter*, if the Court suspect it is not the petition of the bankrupt, but of a third party for a clandestine purpose.

On a *vidé voce* examination, affidavits cannot be read in evidence.

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copy of the depositions of the act of bankruptcy, nor had received any notice from the assignees, that they intended to read the deposition, on the hearing of this petition.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition, submitted, that it did not lie on the bankrupt to prove that he had not committed an act of bankruptcy, but that the assignees must prove the affirmative.

Mr. *Koe*, for the assignees, said that he was not furnished with any affidavit in support of the act of bankruptcy, but that he would read the deposition of that fact from the proceedings.

Mr. *Swanston*, and Mr. *Anderdon*, objected to the reading of the deposition, as no notice had been given to the bankrupt of the intention to read it. This deposition is taken behind the back of the bankrupt, without his having any opportunity to cross-examine the witness who made it. He is declared a bankrupt, upon this *ex parte* proceeding, and is wholly ignorant on what grounds. He has never seen the deposition, although he has often asked to see it. It would be monstrous, that under these circumstances the deposition is to be read in evidence against the bankrupt. The bankrupt has lost no time in coming to the Court for redress; for the fiat was only issued on the 15th of last month, and the petition was presented on the 20th.

The Court said, that the assignees ought certainly to have come prepared to support the act of bankruptcy, by

affidavit, although the Court might, for their own satisfaction, look at the depositions before the Commissioners.

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Mr. *Koe* then applied for the petition to stand over, in order to enable the assignees to procure the necessary affidavit.

Mr. *Swanston* objected to any delay, and contended that as there was no evidence in support of the act of bankruptcy, the fiat ought to be annulled.

ERSKINE, C. J., and Sir GEORGE ROSE, then called for the proceedings, in order to see whether, on the face of them, there was any evidence of an act of bankruptcy.

Sir JOHN CROSS.—I shall decline to look at what is not regularly in evidence before the Court.

ERSKINE, C. J.—Upon inspecting the proceedings, there appears, on the face of them, to be an act of bankruptcy; and I think it would be reasonable, therefore, to grant further time to the assignees to procure the necessary affidavit in confirmation of the deposition. For, if we were now to annul this fiat, for want of evidence, there might be another fiat issued, and an increase of expense unnecessarily incurred. With regard to the inspection of the proceedings, it appears to have been the practice of this Court to look at them, on a petition to annul the fiat, in order to see whether it is a case for annulling, or for dismissal, or for further inquiry. I should be sorry to dismiss a petition, merely upon what appears on the proceedings. On the contrary, I shall always endeavour to give the bankrupt an opportunity of

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answering what appears against him on the depositions. In this case, I think there ought to be some further inquiry ; and as the counsel for the bankrupt has suggested a *vivâ voce* examination, it appears to me, that that will be the proper measure to be pursued.

Sir JOHN CROSS.—This appears to me a very oppressive case against the bankrupt. A fiat has been issued against him, and upon statements made behind his back, he has been declared a bankrupt. He asks to see the depositions, upon which the adjudication proceeded, and it has been refused. He then petitions this Court for redress ; when the assignees, who are bound to support the affirmative, decline to produce any affidavits, but rely upon the deposition on the proceedings, which they have refused to permit the petitioner to see ; and then ask for the petition to be dismissed. Is this to be endured in a country which prides itself upon the publicity of its judicial proceedings, where no subject is to be deprived of any right, unless by justice administered *apertis foribus* ? The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy. I purposely abstain in all these cases from looking at the proceedings ; for my mind is so constituted, that I cannot, in forming my judgment on any matter before me, separate the regular from the irregular evidence. If the depositions are to be read by any portion of the Court, I think, upon general principle, they ought to be read aloud, in order that the counsel for the bankrupt may have an opportunity of answering them ; and I would suggest, that in future such should be the practice in all cases like the present. It was hard enough against the bankrupt, when there was only one judge to decide on

his petition; but when there are three judges, who may take different views of the subject, the hardship is greatly increased. So far from thinking that the petition ought to be dismissed, I think that in justice the fiat ought to be annulled.

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Sir GEORGE ROSE.—When the Court looks at the proceedings, in these cases, it does not treat them as evidence; but it looks at them for the purpose of governing its discretion, whether to annul or grant a new fiat. If the deposition upon the proceedings do not contain an act of bankruptcy, the petitioner would be entitled to annul immediately; and therefore it is for his benefit, that the Court inspects the proceedings. I can take upon myself to say, that for a period of thirty years the Court has not only been in the habit of looking at the proceedings, upon a petition of the bankrupt to suspend, but that it has been uniformly held to be the duty of the Court to look at them, and to call for further affidavits, if it is not satisfied with the statement contained in the depositions. In the present case, with a little explanation, there would be a clear act of bankruptcy upon the proceedings. The Court has a right to say, therefore, that further affidavits may be made, when the depositions or affidavits already made do not satisfy our minds. No counsel has a right to say to the Court, “You shall decide this case, without further affidavits.” When we find, that Commissioners have gone to the length of adjudicating a man a bankrupt, and that there is every probability, from what appears on the proceedings, that they were justified in such adjudication, we ought to see whether it cannot be fully established by further affidavits; for it is our duty to protect the assignees, as well

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as the creditors who have proved their debts under the fiat. In *Ex parte Vipond* (a) it was held, that the assignees might rely on the proceedings, and that the bankrupt was not entitled, as a matter of right, to inspect the proceedings, or to hear them read. It is not necessary to make any observations, as to the justice of the practice; it is sufficient to say, that such is the strict practice. It is, however, impossible not to perceive the hardship (b) of the bankrupt's situation, if the practice was to be strictly adhered to; and therefore the Court has, in the exercise of its discretion, given the bankrupt an opportunity of answering the statements in the depositions, or has granted him a *vivá voce* examination, if he has been desirous of trying the question by that mode of inquiry.

Mr. *Swanston*. The bankrupt, being deprived of all his property, cannot, I fear, bear the expense of a *vivá voce* examination.

Sir JOHN CROSS.—As the assignees have been the cause of this double trial, they ought, in my opinion, to be visited with the costs of the day.

ERSKINE, C. J.—As the case of *Ex parte Vipond* clearly lays down a rule of practice, that the petitioning creditor may come to support the fiat, relying solely on the depositions, without any affidavits in confirmation of the facts there deposed, and without giving any notice to the bankrupt of an intention to read the depositions, I

(a) 1 Madd. 694.

(b) See some observations on the case of *Ex parte Vipond* in 1 Deac. B. L. 825, note (3).

think the assignees should not be compelled to pay the costs of the day.

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Sir GEORGE ROSE.—The importance of the Court inspecting the proceedings, is proved by the circumstances of this case. It appears, from an examination of these proceedings, that the bankrupt's last examination was adjourned by the Commissioners, because there was an action about to be tried at York Assizes, in which the question of the validity of the fiat would come in issue. I think it is therefore but just, that this petition should stand over, until that action is disposed of, which may very possibly save the expense of a *vivâ voce* examination.

Mr. *Swanston* now applied to the Court, on behalf of the bankrupt, for an Order to postpone the *vivâ voce* examination, until the assignees had furnished copies of the depositions as to the act of bankruptcy, and notice of the particular act of bankruptcy on which they intended to rely, together with a list of the witnesses to be examined. If the respondents had filed affidavits, the bankrupt would have been able to answer them; and as the witnesses in support of the fiat are to be examined *vivâ voce*, he ought to be placed, as nearly as possible, in the same situation, by having a statement of their names, and what facts they are to be called to prove.

Westminster,  
April 19.

Mr. *Koe*, *contrâ*. There can be no necessity to furnish the bankrupt with any statement of what act of bankruptcy is to be proved, as he will have an opportunity of cross-examining the witnesses on the *vivâ voce* examination. And the same reason is an answer to the

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application for copies of the depositions; for they are not intended to be relied on, as the witnesses are to be examined *vivâ voce*; and the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the Commissioners proceeded; *Ex parte Jackson (a)*. With respect to giving lists of the names of the witnesses, such a thing was never heard of, and would be most dangerous in its consequences, by affording a facility of tampering with the witnesses.

ERSKINE, C. J.—When this petition was previously before the Court, the counsel for the respondents proposed to read the deposition of the act of bankruptcy on the proceedings, in support of his case, which he might have done if he had given notice of his intention to read them. If they had been read, the probability is, that the Court would have ordered a *vivâ voce* examination; and the bankrupt would have thus heard the case against him, as contained in the depositions. It is but fair, therefore, if the assignees mean to rely on any other act of bankruptcy than what is contained in the depositions, that the bankrupt should have notice of it. The bankrupt stands in a very peculiar situation; he is declared a bankrupt by a proceeding behind his back—all his property is taken from him—he is entitled, therefore, to the indulgence of this Court, in assisting him to arrive at a knowledge of the case which is made against him, unless there has been anything unfair in his conduct, or he has acquiesced in the fiat. It is but justice to him, I think, that he should have copies of the depositions, and notice of any fresh act of bankruptcy intended to be proved at

(a) 2 Deac. & Chit. 601.



the *vivâ voce* examination; but he is not entitled to a list of the witnesses.

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Sir JOHN CROSS.—It is essential, that this case should not be drawn into a precedent, as the Order now made depends on the peculiar circumstances of this case, which are these. On the former occasion, the petitioning creditor was wholly unprepared to offer any evidence of the act of bankruptcy but the depositions before the commission, which he proposed then to read. The evidence of the depositions on the proceedings resembles, in its nature, those taken before a magistrate on a committal for felony, which are not evidence at the trial; so that it appeared to me, that the petitioning creditor was, in strictness, out of Court, as he had no other evidence but the depositions; but the rest of the Court thought otherwise. If the petitioning creditor had done what he ought, he would have filed affidavits—this would have given the bankrupt an opportunity of knowing every tittle of evidence which he intended to produce in support of his case, as well as the names of the witnesses. It appears to me, therefore, that it was an indulgence granted by this Court to the petitioning creditor, to give him time to produce further evidence on a *vivâ voce* examination. It is under such circumstances that I think it reasonable, that what the bankrupt asks should be granted to him.

Sir GEORGE ROSE.—It would have been quite of course,—if the bankrupt had applied at the hearing, when the *vivâ voce* examination was ordered, for a statement of the acts of bankruptcy intended to be relied on,—that this Court should have made an order to that effect; and it is now of course so to order. The only question

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is, as to the costs of the present application. At the hearing, the bankrupt might have had copies of the depositions, if he had asked for them; or he might have insisted, that the *vivâ voce* examination should be confined to the identical witnesses, who had made the depositions before the Commissioners. As far as the inclination of this Court is concerned, there is never any reason why a bankrupt, petitioning to annul the fiat, should not see the depositions on the proceedings. There is only one case, where the Court would have refused such an application, and that is, where the Court has reason to suspect that the petition to annul is not the petition of the bankrupt, but of some other person for a clandestine purpose. It may be proper to observe, on the present occasion, although the question is not now before the Court, that as the *vivâ voce* examination was ordered to clear up some doubts in the mind of the Court, as to whether the statement in the depositions was sufficient,—and the assignees then solely relied on the depositions themselves, to prove the act of bankruptcy,—no evidence can be offered to make out a new case. All that the assignees can do, is, to prove by parol evidence the facts stated in the depositions, eliciting such an explanation of them from the witnesses, as may make them amount to an act of bankruptcy.

The COURT ordered the petitioner to be at liberty to inspect the proceedings, at all reasonable times before the day fixed upon for the *vivâ voce* examination; and that the assignees should give notice of any and what act of bankruptcy they intended to rely on; and that the costs of this application should abide the result of the petition.

The examination of witnesses *vivá voce* came on this day.

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Mr. Koe, and Mr. Bacon, for the assignees, called and examined several witnesses to prove the act of bankruptcy, and then proposed to read some of the affidavits filed at the last hearing.

Mr. Swanston, and Mr. Anderdon, on the petition of the bankrupt, objected to this course of proceeding.

The COURT said, that the practice was, that no affidavits can be read on a *vivá voce* examination, any more than on the trial of an issue, except by special order; and that in the present instance the witnesses, having failed to prove an act of bankruptcy, the fiat must be annulled.

Fiat annulled, with costs.

Ex parte JOHN FAIRWEATHER HARRISON, PASCOE St.

LEDGER GRENFELL, and others.—In the matter of  
WILLIAM MEDLEY, and ARTHUR OUVRY MEDLEY.

Gray's Inn Hall,  
March 16,  
Westminster,  
April 24, 1838.

THIS was a petition to be declared equitable mortgagees of eighteen shares in the Stanhope and Tyne Railway Company, and for the usual order for a sale.

The bankrupt  
agreed with A.,  
the managing  
director of a  
railway com-  
pany, that cer-

tain shares belonging to the bankrupt should be a security for the payment of a bill accepted by A., for the accommodation of the bankrupt, which the bankrupt discounted with B., with whom the certificates of the shares were deposited; but no formal notice to the company was given of the transaction, until four days before the fiat issued; nor was any transfer made of the shares in the books of the company, which were still standing in the bankrupt's name at the time of his bankruptcy. By the rules of the company, no shares could be transferred, without the consent of the directors; and A., as managing director, received all applications for the transfer of shares:—*Held*, that the shares were not in the order, and disposition, or reputed ownership of the bankrupt.

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*Harrison* was the resident director in London of the company, and the other petitioners were the surviving partners of the banking-house of Sir *James Esdaile & Co.* The bankrupt, *William Medley*, had carried on the business of a bill-broker in London, in copartnership with *Thomas Scott*. In September 1836, *Harrison* sold to *William Medley* eighteen shares in the railway company, and caused them to be transferred to him in the books of the company; and they were standing in his name at the time of the bankruptcy. He contracted, also, for the purchase of two other shares; but, not having paid for these, they were not transferred to him. Shortly after the purchase of the above shares, *Harrison* was induced, on the application of *William Medley*, to lend him his acceptance for 2000*l.*, on the security of the shares; on which occasion *William Medley* wrote and delivered to *Harrison* a letter, of which the following is a copy:—

“ 6th September 1836.

“ In consideration of your accepting on my account, the draft of Mr. *John R. Rose*, for 2,000*l.*, dated this day, at four months, due 9th January 1837, I hereby engage to provide for the same at maturity; and I lodge in your hands twenty Stanhope and Tyne Railway shares, as a collateral security.”

At the same time *William Medley* authorised his clerk to deliver to *Harrison* the certificates of the railway shares, but this was omitted to be done; and it was alleged by *Harrison*, that they were allowed by him to remain with *Medley* on *Harrison's* behalf, it being impossible, from the situation held by *Harrison* in the company, that *Medley* could effectually dispose of the shares, without *Harrison's* knowledge, and his having the means to prevent him:

The petition then stated, that on the 15th December 1836, *Medley* applied to the petitioners, *Esdaile & Co.*, to discount the bill for 2000*l.*, which they accordingly did; and that shortly before it became due, they sent to *Medley* and *Scott* to inquire whether the bill would be paid on its falling due; when *Scott* stated, that *Medley* held a security on the Stanhope and Tyne Railway shares, expressly to secure payment of the acceptance; and he represented the shares to belong to *Harrison*, and at the request of *Esdaile & Co.*, *Scott*, on behalf of *Medley*, delivered to them the certificates of the eighteen shares, with a letter, of which the following is a copy:—

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“ London, 5th January 1837.

“ Gentlemen,

“ We beg to hand you herewith, eighteen Stanhope and Tyne Railway shares, and we will further furnish you with two others, when we receive them from Mr. *Harrison*; the above-mentioned Stanhope and Tyne Railway shares to be held as a collateral security for the payment of a bill for 2,000*l.*, accepted by J. H. *Harrison*, due 9th January; and, in default of payment, we hereby authorise you to sell the said shares, to repay yourselves.

“ We are, Gentlemen, your most obedient servants,

“ *Medley, Scott & Co.*”

“ Sir James *Esdaile & Co.*”

Shortly before the above-mentioned bill became due, it was arranged between *Harrison* and *Medley*, that *Harrison* should accept another bill for 1800*l.*, in part renewal of his acceptance for 2000*l.*, which should be placed by *Medley* with *Esdaile & Co.*; and that with this renewed bill, and a farther sum to be provided by *Medley*, the acceptances for 2000*l.* should be taken up. On the 9th January 1837, *Scott* informed *Harrison*, that the certificates of the eighteen shares had been lodged with *Esdaile & Co.*, as a collateral security for the acceptance of 1800*l.*; and the certificates remained with

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*Esdaile & Co.*, with the sanction of *Harrison*. And it was alleged, that the company, through *Harrison*, had notice on the 9th January 1837, that the certificates were deposited with *Esdaile & Co.* But on the 27th January 1837, *Harrison*, with the knowledge of *Esdaile & Co.*, addressed a formal notice in writing to the directors of the company, informing them that he claimed the eighteen shares, by virtue of the agreement of the 6th September 1836.

On the 31st January 1837 the fiat was issued against the two bankrupts, and the bill for 1800*l.* fell due on the 12th March following, and was not paid.

The petitioners applied to the assignees of the bankrupts to join with them in a sale of the shares, for the purpose of applying the proceeds in payment of this bill; but the assignees claimed the shares as the property of the bankrupt.

By the deed of settlement of the Stanhope and Tyne Railway Company, it was declared, that any proprietor might procure any other person to become a proprietor in respect of the shares held by him, provided such new proprietor was approved of by the directors of the company. The petition alleged, that in pursuance of this declaration, no shares could be transferred by the proprietors, without a written application being first made to the directors at their office in London by the proprietor desirous of transferring the same, expressing the number of shares, the individual to whom the transfer was to be made, and the amount of the consideration money. That the application was required to be delivered to the secretary of the company, and to be by him submitted to the directors at their weekly meetings for their approbation, or disapprobation. That *Harrison*,

as managing director in London, had for many years past received all applications for the transfer of shares, and attended the weekly meetings, when such applications were decided upon; and that it would have been, therefore, impossible for *Medley* to have transferred the shares standing in his name, without the knowledge of *Harrison*; who would of course have prevented any such transfer, until payment by *Medley* of the bill for 1800*l*. The petitioners also contended, that the shares were chattels real, being an interest derived from lands, and not of a personal nature, within the order or disposal of *Medley* at the time of his bankruptcy.

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Mr. *Swanston*, in support of the petition. The question is, in this case, whether the knowledge of Mr. *Harrison*, the managing director of the company, amounted to notice of the deposit of these shares by the bankrupt. It is true, that in the case of *Watkins* and *Kidder* (a) before the Lords Commissioners, it was decided that the knowledge of one of the directors, to a certain extent, did not amount to notice. But it is submitted, that the only use of notice is to give knowledge. *Harrison*, therefore, having in the present case ample knowledge of the deposit of the shares, it would be absurd to contend that *Harrison* should give notice to himself. And no fresh notice given by the bankrupt, or any one else, to *Harrison*, could impart to him more knowledge than what he already possessed; any further notice would be a perfect superfluity. If notice to one partner of a firm has been held sufficient notice to all the members of the partnership, *a fortiori*, a notice to the managing partner, as *Harrison* was in this case, is notice to the whole firm.

(a) *Ex parte Burbridge*, 1 Deac. 131.

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Then the personal interference of *Harrison*, as the managing director of the company, was so necessary to any dealing with this property, that no transfer of the shares could possibly take place without his knowledge. In *Ex parte Stright* (a) it was held, that a letter to the officer of an insurance company from an equitable mortgagee of two policies, stating that he was the holder of them, and inquiring what sum the office would give if they were delivered up to be cancelled, was a sufficient notice to the insurance company of a change of ownership. In that case his Honor Sir *G. Rose* observed, that the slightest circumstance, in point of notice, is sufficient. [*Erskine*, C. J. The letter in that case was addressed to the secretary of the company, *as secretary*.] The decision in *Ex parte Smart* (b), also, is very strong in favour of the position now contended for. There the equitable mortgagee was one of several trustees, to whom notice of any mortgage or transfer was necessary to be given; and it was held by this Court, that the transaction itself, being notice to one of the trustees of his own act, was sufficient notice to all the trustees, to prevent reputed ownership. The same principle was recognized in *Ex parte Waithman* (c), where the bankrupt, being one of the directors of a life assurance office, deposited a policy of that office with his bankers, as a security for advances, one of the bankers being the auditor of the insurance company; and it was held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy.

At this period of the argument, some discussion arising, whether the Court could make an Order on the

(a) 2 Deac. &amp; C. 314.

(b) 2 Mont. &amp; A. 60.

(c) 4 Deac. &amp; C. 412.



petitioners to deliver up the certificates of the shares, in case the Court should decide the question in favour of the assignees, it was proposed that the further hearing of the case should stand over, that the petitioners might determine whether they would submit to any Order which the Court might make in this respect. It was however finally arranged, that the shares should be sold, and the proceeds paid into Court, with liberty for either party to apply for the proceeds.

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Mr. *Swanston*, and Mr. *J. Russell*, now, on behalf of the petitioners, claimed to have the proceeds paid over to them, pursuant to the prayer of the petition. They referred to the provisions of the deed of settlement, by which the Stanhope and Tyne Railway Company was constituted ; by the 89th section of which it was provided, that the directors should cause the name and place of residence of every present and future proprietor, and the number of each share, to be entered in a book called the "Share Register Book," and should, on notice in writing being left at the office of any proprietor having changed his or her name or place of residence, cause such new name or place of residence to be entered in such book. By section 157 it is also provided, that any person desirous to transfer any share, should transfer the same either at the office of the company, or at such other place as the directors should require, and in such manner and form as the directors should prescribe, and should do and execute all such acts and deeds for vesting such share in the new proprietor, as the directors should require. By section 158 it is provided, that every deed of transfer shall be obtained from the office of the company, and that every person to whom a transfer may

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be made, is required to pay to the secretary the cost of the stamp for the deed; and every such deed is required to be deposited at the office of the company. It so happens, that the son of the petitioner, *J. F. Harrison*, is the secretary of the company; and the son, *Mr. G. W. Harrison*, has made an affidavit, stating, that in September 1836 he found an entry in his father's books of the bill for 2000*l.*, which had been discounted by his father for the accommodation of the bankrupt; and that his father delivered to him the letter from the bankrupt dated 6th September 1836, and that he would not have permitted the bankrupt to transfer the shares, or to receive any dividends on them, without the authority of his father. As *Mr. Harrison*, therefore, delivered to the secretary, the proper officer of the company, the actual letter of the bankrupt, in which he acknowledged that he had deposited the certificates of the shares with *Mr. Harrison*, there could not be a more effectual notice to the company of that fact; for it appears from the rules of the company, that the intervention of the secretary is absolutely necessary, whenever an application is made for the transfer of any shares. But, independently of this notice to the secretary, the decisions in *Ex parte Smart (a)*, and *Ex parte Waithman (b)*, which were cited on the former hearing, are complete authorities to show, that notice to one of the directors of a company is sufficient notice to the company itself. With respect to the case of *Ex parte Burbridge (c)*, decided on appeal by the Lords Commissioners, that case merely decided, that the accidental or private knowledge of one of the directors of a public company did not amount to notice.

(a) 2 Mont. &amp; A. 60.

(b) 4 Deac. &amp; C. 412.

(c) 1 Deac. 131.

Besides, with all due deference to that decision, it is somewhat difficult to discover the grounds on which the Lords Commissioners founded their jurisdiction in that case; for, whether a party had notice of a transaction, or not, being entirely a question of fact, and this Court having found the affirmative of that fact, it would seem, consistently with the provisions of the statute (*a*) that regulate appeals from this Court, that the Lords Commissioners had no jurisdiction to enter into the fact of notice. [Sir *G. Rose*. I certainly never understood how that case, which was a mere question of fact, could be the subject of appeal.] But the decision in that case, as to knowledge not amounting to notice, is wholly at variance with that of Lord *Lyndhurst* in *Smith v. Smith* (*b*); where it was held, that a private communication between a mortgagee of stock and one of several trustees, in whose names the stock was standing, without any view on the part of the mortgagee of giving validity to the security, was sufficient to prevent the operation of the clause of reputed ownership.

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Mr. *Burge*, and Mr. *Anderdon*, *contra*. On the former occasion, it was contended by the other side, that notice to the director, who is the petitioner and party interested in this case, was sufficient notice to the company. Now they have got the affidavit of Mr. *G. W. Harrison*, the secretary of the company, as to his knowledge of the transaction. But how does Mr. *G. W. Harrison* arrive at that knowledge? Merely in the character of clerk to his father, and by asking in that character a question of his father, about his transactions with the

(*a*) See 1 & 2 Will. 4. c. 56. s. 3.

(*b*) 4 Tyrw. 52; 2 Cr. M. & R. 231.

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bankrupt. It is admitted by the petition, that in September 1836, when the letter of defendant was written, the certificates of the shares were not handed over by the bankrupt to the petitioner; for we find him afterwards handing them over to *Esdaile & Co.*, who had discounted the original bill for 2000*l.* The bankrupt appeared by the company's books to be the owner of these shares; for, at the period of his bankruptcy, they were still standing in his name, notwithstanding *Harrison's* son had a secret knowledge of the letter of deposit. It was not before the 27th January 1837, that a formal notice was given by the petitioner to the secretary of the company, that he claimed any interest in these shares. Then, according to *Ex parte Burbridge*, the previous knowledge of the secretary was not sufficient to prevent the reputation of ownership. But there is another way of looking at the case, in considering the effect of the agreement of deposit. The case ought to be decided in the same way, with reference to the rights of the respective petitioners, as if they were the conflicting rights of a first and subsequent incumbrancer. The agreement of deposit, in this case, was to secure the payment of a specific bill for 2000*l.* That bill has been satisfied by the subsequent arrangement between the parties, and by giving the substituted bill for 1800*l.*; so that, in fact, the bill for 2000*l.* must be considered as paid. The agreement of deposit, therefore, cannot be applicable to the bill for 1800*l.*; for you cannot extend a deposit to another purpose, which was given for a particular purpose.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The subject-matter of this petition is the right to certain shares in the Stanhope and Tyne

Railway Company, which have been sold by agreement under the order of the Court, and the proceeds of which are now claimed by the petitioners. The assignees, in opposition to this claim of the petitioners, contend that the shares were either in the reputed ownership of the bankrupt at the time of his bankruptcy, or that they were not validly pledged as a security for the bill for 1800*l.* It appears, that on the 5th January 1837 the certificates of the shares were actually deposited by the bankrupt's partner with *Esdaile & Co.*, as security for a bill of exchange for 2000*l.*, which the petitioner *Harrison* had accepted for the bankrupt, and which the other petitioners, *Esdaile & Co.*, had discounted for him. Afterwards, when this bill became due, another bill for 1800*l.* was accepted by *Harrison*, in part renewal of the first mentioned bill; and the bankrupt's partner informed *Harrison*, that the certificates of the shares had been lodged with *Esdaile & Co.*, as a collateral security for the 1800*l.* bill. Now, at that time, supposing bankruptcy had taken place, could those shares be considered in the order and disposition of the bankrupt? *Harrison* was the managing director of the company in London, and *G. W. Harrison*, the secretary of the company, had the letter handed over to him, in which the bankrupt agreed to deposit the certificates of the shares for the payment of the first mentioned bill. If at that time the bankruptcy had occurred, can it be said that the company had no notice of the deposit? The case of *Ex parte Burbridge* has been relied on by the assignees; but if there is any distinction between the facts of that case and this, the Court ought to avail themselves of it, to prevent the authority of that case from being extended too far. Now, there is a manifest distinction between the facts of

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the two cases. In *Ex parte Burbridge*, Mr. Allen, the director, had no official notice, but a mere casual knowledge of the deposit of the shares—he had no interest whatever in the deposit, and the certificates remained in the hands of the bankrupt. Here, the certificates were actually deposited; and it is expressly stated, that there could not be any transfer of the shares without the sanction of *Harrison*, nor any payment of the dividends without his consent. It appears therefore to me, that the deposit in this case was a valid and effectual deposit to secure the payment of the bill for 2000*l.*, so as to prevent the shares from being considered to belong to the bankrupt, as reputed owner. But then it is said, that though the deposit might be good for the 2000*l.* bill, it cannot be extended to secure the payment of the bill for 1800*l.* But this was part of the same debt; and the bankrupt's partner expressly informed *Harrison*, that the certificates were lodged with *Esdaile & Co.*, to secure the payment of the bill for 1800*l.* All parties, therefore, were privy to this arrangement. Can it be said, then, that these shares were in the order and disposition of the bankrupt, when he had parted with the possession of the certificates, and no transfer could be made of the shares, without the authority of the parties for whose use the certificates had been so deposited by the bankrupt? The managing director, and the secretary, to whom reference would be alone made for information to whom the shares belonged, could have told any inquirer, at once, that they did not belong to the bankrupt. The bankrupt, therefore, can not be said to have been the reputed owner of them.

Sir JOHN CROSS.—The property in question consists

of certain shares of a private partnership in some coal mines, limestone quarries, and railways, and the assignees claim them by force of the statute. The petition alleges they are real property, and therefore not within the statute, which extends only to goods and chattels. This appeared to me a decisive answer to the claim; but, for some reason or other, not made known to the Court, it has been thought more advisable, on the part of the petitioners, to waive that point, at least for the argument's sake, and to enter on a lengthened discussion of the question of notice, which it is admitted would be sufficient to preclude the claim of the assignees, if the shares are to be deemed goods and chattels. The right of property in these shares belongs, unquestionably, to the petitioners, as against *Medley*, and consequently as against the assignees also, unless they can establish a new and special title under the statute, by proving, amongst other things, that he was the reputed owner at the time of his failure. This is a question of fact, and the burthen of proof is upon the assignees. But, instead of offering any evidence, they have shifted the burthen to the other side, and insist it is incumbent on the petitioners to make out their title by proof of an express notice thereof to all the proprietors. There are precedents, certainly, which seem to authorize that course of proceeding, in the case of *debts* assigned by a trader, who afterwards becomes bankrupt. And if the property now in dispute were a debt, we should, perhaps, have been bound by their authority. Such notice is, of course, always necessary to prevent a creditor, who assigns his debt, from receiving it himself. But that is quite a different thing from the notice in question, with which, nevertheless, it seems to me to have been in some cases

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confounded. For I own it appears to me somewhat of a strained inference, to conclude that the assignor of a debt is the reputed owner of it, merely from the fact of the debtor not being informed of the assignment, although three persons only appear to have known of the existence of such debt, two of whom knew it to be assigned, while the third, being himself the debtor, cannot be supposed to have been misled by any false rumour, to give undue credit to the bankrupt. Nor can I well understand, how, if he were the reputed owner, a mere private notice to the debtor, could alone suffice to prevent or extinguish such common repute. For what is the reputation of ownership? It was said by Chief Justice *Gibbs*, and repeated by Chief Justice *Dallas*, in answer to that question, in the case of *Oliver v. Bartlett*, "It is the opinion of a man's neighbours, it is a number of voices, as it were, concurring upon the fact." Now, let us see what are the facts of this case. The petitioner *Harrison*, being the managing director, sold to the bankrupt *Medley*, the shares in question, and transferred them to him, according to the regulations of the company, and they have stood ever since in his name. Shortly afterwards, *Medley*, for his own accommodation, applied to *Harrison* to accept a bill for 2000*l.*, on the security of these shares. The bill, so drawn, was discounted by *Esdaile & Co.*, and the certificates, which are the only possessory evidence of the property in the shares, and are as the keys without which they could not be transferred to any body else, were deposited with them, as a collateral security, for the ultimate payment of the bill by *Medley*. And this transaction with the manager was shortly after made known to the secretary of the company. Things were in this state, as far as is material to



the present question, at the time of the bankruptcy. Under these circumstances, the question is, whether the assignees are entitled to the shares, by virtue of the statute, which assigns to them all goods and chattels of which *Medley* was permitted by the true owner to have in his possession, or at his disposal, and of which he was at the same time the reputed owner, or took upon himself to sell or dispose of them as owner. Now we have no proof of any of these incidents, subsequent to the delivery of the certificates; nor is there one circumstance, from which any such incident can be inferred, but the mere fact of *Medley* continuing a dormant partner of the mining company. Nothing was afterwards left in his actual possession, nor was he permitted to have any dominion over the shares, nor does he appear to have been by any person reputed to be the owner of them, or to have taken upon himself to sell or dispose of them as owner. And I cannot understand, how I am to adjudge him the reputed owner of a latent and invisible right of property, without any other proof of such repute—especially, as we do not find that any person, except the secretary and the parties immediately concerned in the transaction under consideration, knew any thing at all about the sale of the shares to the bankrupt, or of his subsequent deposit of the certificates. I am therefore of opinion, that the assignees have not made out their title to the shares, by any sufficient evidence requiring the proof of further notice on the part of the petitioners, and consequently that the latter are entitled to the benefit of them.

Sir GEORGE ROSE.—In all these cases of reputed ownership, the question to be determined is merely one

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of fact; and the decision of the Court must be regulated by analogy to previous judgments. Is the state of things such, in the present case, that the bankrupt would have been able to transfer these shares? I apprehend the mode in which we are to try the fact of reputed ownership is, to ascertain whether the bankrupt had the power to make such transfer. Now, the fact of the bankrupt having parted with the possession of the certificates of the shares, would have enabled us to decide the question of reputed ownership, independently of any question of notice. But, assuming the question of notice to be open, was there not in this society a right to prevent the transfer of the shares to any assignees; there being a printed notification on the face of the share certificates, that no transfer shall be made without the consent of the directors? Then, the Court has to decide what would be sufficient notice to the society to authorize them to prevent the transfer of the shares. If there had been a mere casual knowledge obtained by one of the directors of the deposit of the certificates, he perhaps could have had no right to prevent the transfer. But here there was notice to a director, in respect of his own right. It is contended, however, that the knowledge of one director is not notice to all. But, in law, notice to any one is notice to all; it is not necessary to give a separate notice to every individual director. But whatever question may arise, as to the sufficiency of notice to one or more directors, it is in evidence, that the secretary considered himself justified in preventing the dividends on the shares being paid to the bankrupt; they cannot, therefore, under these circumstances, be said to have been in his order and disposition.

Usual Order.

Ex parte EDWARD CONNELL.—In the matter of JOHN CLARKE, and THOMAS PARRY.

1838.

*Gray's Inn Hall,  
March 17 and  
April 30 1838.*

THIS was the petition of the registered public officer of the Northern and Central Banking Company, to prove a debt on behalf of the bank, under the following circumstances.

The bankrupts carried on the business of drysalters, in copartnership, at Manchester, and *Parry* also carried on the same business there, on his separate account. The partnership had a joint account with the bank, and *Parry* had also a separate account with them. At the time of the bankruptcy, *Clarke* and *Parry* were indebted to the bank, on the partnership account, in the sum of 3765*l.* 5*s.* 9*d.*, and *Parry* was indebted to them 21*l.* 1*s.* 10*d.*, on the balance of his separate account. The bank was a joint stock banking company, established under the provisions of an act of parliament, and was carried on under a deed of settlement, bearing date the 1st July 1834, whereby it was provided, that all debts, liabilities, and engagements due to, or subsisting with the company, by or on behalf of any proprietor, either in respect of cash advances, or balances, on running bills or notes, or on any account, should, in all cases, be the first and paramount lien and charge on all the shares and stock of such proprietor, whether such debts be those of such proprietor solely, or jointly with any other person; and the Manchester directors were empowered to cancel, and extinguish, and to declare forfeited, or to sell and dispose of the shares of such proprietor, either wholly or in part, towards liquidation of such debts. And it was declared, that it should not be lawful for two or more individuals to hold jointly any

A joint stock banking company made advances to a bankrupt's firm, on the security of shares in the bank, which stood in the separate names of the two partners, in compliance with the rule of the company, that no shares should be held jointly, but which the partners agreed should be considered partnership property. Held, that the company could not prove the amount of their debt, without deducting the value of the shares; *dissentiente* Sir J. Cross.

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shares, and that no share should be divided into fractional parts. And that no subscriber of any shares should be considered a proprietor of the company, until he should have executed the deed of settlement.

On the 24th December 1834, *Parry*, who was not then in partnership with *Clarke*, having applied for shares in the bank, had ten shares allotted to him, and he thereupon executed the deed of settlement. In July 1835, he purchased five other shares, and in October following, fifteen other shares; which twenty shares had been previously held by one *Morris*, and were transferred by him to *Parry*. In March 1835, *Parry*, having applied for other shares in the company, had thirty shares allotted to him; and in November 1836, he purchased ten other shares of *T. A. Armstrong*, which were duly transferred to him. At the date of the fiat, the forty shares allotted to *Parry*, and the thirty shares purchased by him, were respectively standing in his name in the books of the company.

In August 1835, *Clarke* purchased twenty shares, and in October 1837, ten other shares of *Morris*, by whom the same were duly transferred to *Clarke*; who thereupon executed the deed of settlement. In October 1835, *Clarke* purchased ten other shares of *W. W. Cargill*, by whom the same were duly transferred to *Clarke*. On the 12th March 1836, *Clarke*, having applied for other shares, had twenty-five other shares allotted to him separately, by the directors of the company. In December 1836, *Clarke* purchased ten other shares of *Armstrong*, which were also duly transferred to him. At the date of the fiat, the twenty-five shares allotted to *Clarke*, and also the fifty shares transferred to him, were

respectively standing in his name in the books of the company.

On the 14th December 1837, a joint fiat was issued against *Clarke* and *Parry*; and on the 30th December, the petitioner, on behalf of the bank, proved the separate debt due from *Parry*, excepting the seventy shares so standing in his name as a security. The petitioner also tendered a proof against the joint estate for the amount of the debt due from *Clarke* and *Parry*, claiming to retain the shares as the separate securities of each of the bankrupts; but the Commissioners rejected this proof, on the ground that the shares were the partnership property of the bankrupts, and that they ought to be sold in part satisfaction of the debt, and the petitioner be only permitted to prove for the residue.

The bankrupts had both made affidavits, stating, that it was agreed between them that all the shares should be partnership property, although they should stand in their separate names, in compliance with the rules of the company.

Mr. *Swanston*, and Mr. *Bacon*, in support of the petition. The only question is, whether these shares were to be considered joint estate, or not. The bankrupts contracted a joint debt with the bank, on the representation that the shares belonged respectively to the separate estate of each of the partners; and the bank made advances to them, on the faith that the shares were separate property. In none of the decided cases have the contracting parties, as in the present case, charged the property in question as separate property. That contract forms one of the distinctive features of this case. [Sir *G. Rose*. In bankruptcy, you are not bound

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by such a contract, in administering the joint and separate assets.] These shares are a separate security for a joint debt. There is another important distinction in this case, arising from the stipulations in the deed of settlement; which expressly provides, that all the debts due to the company by any proprietor shall, in all cases, be the first and paramount lien on all the shares of such proprietor; and that it should not be lawful for two persons to hold any shares jointly. [*Erskine, C. J.* The question is, whether you can prove against the joint estate, without realizing the separate security. These shares, though separate, are security for the joint debt.] They were deposited by each partner separately, for advances made by the bank to the partnership. Some of these shares were possessed by each of the bankrupts before their partnership. There could, in this case, be no reputation of joint ownership; nor can any secret contract or arrangement between the bankrupts, after they become partners, deprive the company of its right to treat these shares as separate property.

ERSKINE, C. J.—It is the general rule in bankruptcy, that before a creditor is admitted to prove against the joint estate, all the joint securities in his hands must be realized, and the amount deducted from his debt. The only question is here, whether these shares in the hands of the petitioners are joint property, or not. If the evidence before the Court is sufficient to decide that fact, the Court will now determine it; but if an inquiry will be more satisfactory to the parties, the Court has no objection to direct an inquiry. And although the shares may turn out to be joint property, still, if there is any lien which pre-existed, in respect of the partners sepa-

rately, before the partnership, that lien must of course be first satisfied.

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Sir JOHN CROSS.—There is no difficulty about the principle; the only difficulty is, as to the application of it. The question is, whether these shares can be considered partnership property, until the lien of the bank upon them is satisfied. If the assignees are entitled to call in the shares, and deduct the value of them from the debt due to the bank, then they must be considered joint property. But can the assignees call in the shares, when they were, by the express terms of the contract with the bank, to be accounted separate property?

Sir GEORGE ROSE.—The leading principle of the bankrupt laws is equalization; which will not suffer a creditor to take one sixpence from that fund, against which he afterwards shapes his proof. It is quite idle for the proprietors of this joint stock banking company to say, that, by the rules they have made for their own government, they can affect the general rule in bankruptcy. If, while the shares were separate property, the bankrupts, by their respective dealing with it, have given any lien against it to any creditor, the assignees cannot now contend that their subsequent dealing with the property has made it joint; but if the shares were ever to be considered as the assets of the partnership, I hold it to be against the policy of the bankrupt law, that any party can, by a previous contract, take it out of the general rule in the administration of assets in bankruptcy. In my opinion, there is nothing in this case, which excludes the shares from being taken as the property of the partnership; and every person holding such

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a security must deduct the amount of it, before he can prove against the joint estate. If any inquiry, however, is wished, as to whether this is joint property, or not, the Court is very willing to grant such an inquiry.

Mr. *Temple*, and Mr. *Anderdon*, for the assignees. The shares never were the separate property of either of the bankrupts, and the rules of the company only amount to a requisition, that the shares should be registered in separate names; they did not declare that the shares should not be liable to any joint contract between the respective proprietors who held them. By the terms of the partnership between the bankrupts, fifteen shares in the bank were to be brought in by each partner, as part of his capital in the partnership; and the other shares, 145 in number, were purchased with the partnership funds; not for the individual benefit of each partner separately, but for the general benefit of the partnership. [Sir *John Cross*. But had not the company a right to consider the shares as separate property, in pursuance of the contract of each partner with the company?] The banking company were well aware, that the shares latterly purchased were bought with the partnership money. They must, therefore, be taken to be part of the joint assets; and no creditor can prove against the joint estate, without accounting for the joint property in his hands.

Mr. *Swanston*, in reply. Bankruptcy does not vary the nature of the property. Now, what was the nature of this property at the time of the bankruptcy? By the stipulations of the company's deed of settlement, every share was to be held by one proprietor, and could not



be held jointly by two. By another clause in the deed, the debts due to the company by any of the shareholders were to constitute a lien upon all his shares; and upon the faith of this contract, large advances were made by the bank to the partnership. The creditor knows nothing here of any private contract between the partners, nor is he bound by any such contract; for no agreement between partners can cause separate estate to be administered as joint estate. If a partner, in possession of separate real estate, direct it to be considered as personal, this will not affect the rights of a prior incumbrancer. [*Erskine*, C. J. That argument would have made in favor of the petitioners, if the debt, in respect of which they claim a lien on the shares, had accrued before they had become joint estate.] The question is here, whether, as between the debtor and creditor, between the shareholder and the bank, these shares are not to be considered the separate property of the several partners.

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ERSKINE, C. J.—The decision of the question now before the Court will not be a precedent in any future case, unless under precisely similar circumstances, depending, as it does, on the policy of the bankrupt law as to the distribution of the bankrupt's estate; one rule of which is, that the joint property shall be divided among the joint creditors, and the separate property among the separate creditors, and not only amongst each respective class of creditors, but that it shall be equally distributed. Another rule is, that any particular creditor may acquire a lien on the assets, giving him a preference over the other creditors. In cases of lien, the Court takes the property as it finds it at the time of the bankruptcy. Where a creditor applies to prove

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against the joint estate, he must declare that he has no security on the estate; or, if he has, he must give it up. It becomes the duty of the Court to ascertain, whether these shares were the property of the firm, or the separate property of each individual partner. If the separate property, then the separate estate would only be a surety for the joint estate, and the banking company are not bound to give the shares up, or sell them. But if they are the property of the firm, then the shares must first be realized, and the amount deducted from the debt; otherwise, they must be given up, before proof can be made. For the present, I shall assume that the shares are joint property, that is, if they were now in the hands of the assignees, they must be distributed as joint estate. But the company contend, that though such might be the case if the assignees were in possession, yet, in the hands of the company, the shares are not joint property; because, by the rules of the company contained in the deed of settlement, the shares must be held solely by one individual. That argument would have much force, if it were proved that the shares had been originally the separate property of each of the bankrupts, and the debt had been contracted before the partnership; because the parties who were the owners of the shares could not, after the lien had attached, destroy the lien, by afterwards making them joint property. But here there is evidence, that the shares were purchased with the joint property of the firm, and after that the debt was contracted. Although the company, therefore, acquired a lien upon the shares, to the extent of the debt, the property, on which the lien attached, was the property of the partnership. Before the company, then, can be admitted to prove, they must comply with

the ordinary rule in bankruptcy, and deduct the amount of the shares. As there is, however, some difference of opinion in the Court, this is not to be considered a final judgment; and if the parties in the mean time are desirous of having an inquiry, the Court is willing to grant it.

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Sir JOHN CROSS.—The question is, whether as against these petitioners, because these shares may for the purpose of the assignees be joint estate, the assignees have a right to say, that for all purposes they are to be so considered. The claim of the petitioners appears to me to depend upon the construction of two clauses in the deed of settlement, without disturbing any rule in bankruptcy, as to the distribution of joint property among the joint creditors. As it is an important question, and one that must be continually occurring to every company that has clauses of a similar description in its deed of settlement, I should wish to take time to consider of my judgment. The material point for consideration is, whether these shares were not always separate property in the hands of the petitioners, and never joint property until they came to the hands of the assignees,—whether, in short, any part of these shares can be considered joint property, until the claims of the petitioners are satisfied.

Sir GEORGE ROSE concurred in opinion with the Chief Judge.

*Cur. adv. vult.*

The case was called on this day for final judgment, when

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Sir GEORGE ROSE said he retained the same opinion which he expressed on the hearing of the case.

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Sir JOHN CROSS.—This is a petition on the behalf of a banking company, established pursuant to the statute. It appears, that the two bankrupts were each the holder of several shares in the bank, and that, among other terms and conditions between the bank and each individual shareholder, it was expressly stipulated, 1st. That no share should be held jointly, or be divided into fractional parts; and, 2nd. That every share should be chargeable by the bank, as a security for all debts contracted with them by any shareholder, either individually, or jointly. And that a large sum of money, forming the debt in question, was afterwards advanced on the joint account of the bankrupts, on the credit of that security.

The banking company have applied to prove a joint debt, without giving up their security upon such separate shares. This is opposed by the assignees, on the ground that the shares were joint, and not separate, property, having been purchased pursuant to a previous agreement between the bankrupts themselves, that the shares should be held for their joint benefit. I believe we are all agreed about the general rule in such cases, viz. that a joint creditor, having the separate security of one bankrupt, may prove his debt and retain his security; as was decided in *Peacock's* case, in which Lord *Eldon* said, "The joint estate is primarily liable. The separate estate can only be considered surety for the joint." And it appears to me, that the only question to be determined is, not whether the shares were, as between the bankrupts and themselves, joint property,—for that is not disputed,—but whether, in the hands of the bankers, each share is not, in fact, a separate security for a joint debt? It will, perhaps, rather simplify the question, if we con-

sider how it stands in respect to a single share. The two bankrupts agreed, that one of them should purchase it for their joint benefit. The purchaser agreed with the bank, that the share should not be held jointly, nor be divisible. And, upon the faith of this, the money has been advanced. Yet it is contended, that the right of the bank is to depend, not on the contract they themselves entered into with the shareholder, but upon the contract he made with his partner. But it seems to me, that, in relation to the bank, and in all the dealings therewith, it is to be deemed and taken as separate property, by virtue of the express stipulation, that it shall not be held jointly, nor be divisible. And I think it is not competent to the shareholder to hold his share jointly with his partner, by force of a compact between themselves, adversely to any of the rights of the bank resulting from the share being held by one, instead of by several proprietors.

The question, whether a share is to be deemed a joint, or a separate, security, being, as I conceive it is, rather a question of fact, than of law, former decisions will not afford us much assistance. But there is one, I mean *Bowden's case* (a), in which it was determined by this Court, that after one of two partners had mortgaged his separate property for a joint debt, and then devised it to the other who became bankrupt, it was held, that the interest of the mortgagee remained in *statu quo*, and the proof and the security were both allowed as a double charge on the same bankrupt's estate. In the present case, it appears to me quite immaterial, whether the agreement between the partners, that the share should be joint property, was prior, or subsequent, to the com-

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(a) 1 Deac. &amp; C. 135.

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pact with the bank that it should not be joint, nor be divisible. I am therefore of opinion, that every one of these shares is a separate, and not a joint, security; and that, for all the purposes of security to the bank, it must be deemed separate, and not joint, property; and, consequently, that the bankers are entitled to prove their debt against the joint estate, without surrendering up the shares to the assignees.

ERSKINE, C. J., after stating the facts of the case, said:—The claim of the banking company to prove their whole debt against the joint estate, without deducting the value of the shares, is founded on two clauses in the deed of settlement, which declare that all debts due to the company from any proprietor shall be a paramount lien on all the shares of such proprietor; and that no shares should be held jointly by two or more individuals. The banking company insist, that, by virtue of these two provisions in the deed, whatever right there might be, as between the bankrupts themselves, to deal with these shares as the joint property of the firm, the company have a right to treat them as the separate property of each partner, and to prove against the joint estate, without deducting their separate security. The assignees objected to the proof before the Commissioner, who thought the objection well founded. It was agreed between the bankrupts, that all the shares, which either of them held in this banking company, should be considered as partnership property. The whole of the 145 shares, therefore, were really and *bonâ fide* the joint property of the firm, though standing in the separate name of each partner, in compliance with the rules of the company. If bankruptcy had not intervened, there

could be no question but that the petitioners could have made their claim against either estate available. But there are two rules in bankruptcy, which limit their right in this respect; one of which is, that where a creditor has a joint and several security against two bankrupts, he must make his election to prove, either against the joint estate of the two, or the separate estate of each partner; and the other rule is, that a party who holds a security against any estate, must give up his security, before he can prove against that estate. The question, therefore, is not so material, whether these shares are to be considered joint or separate property, as whether, according to the rule in bankruptcy, a creditor can retain a security for his debt, and prove for the whole amount of it. There are some exceptions to this rule,—as when the creditor holds a security upon a different estate from that against which he seeks to prove; and the ground on which these decisions rest, is, that the separate estate is held to be security for the joint estate. That is the express ground, on which Lord *Eldon* puts the exception in *Ex parte Peacock*(a). Then the question is, to whom did these shares in fact belong? Now, as I said before, the shares, although standing respectively in the name of one, were, in reality, the joint property of the two. I am of opinion, therefore, that this petition must be dismissed; and as it is a petition against the decision of the Commissioners, it must be dismissed with costs.

Mr. *Swanston* submitted, that as there was a difference of opinion in the Court on the question, it would be rather hard to dismiss the petition with costs.

(a) 2 G. & J. 27.

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ERSKINE, C. J.—When a petitioner brings a matter before the Court on a wrong foundation, the usual course is, that he pays costs.

Petition dismissed, with costs.

April 11, 1838.

Coram

Sir J. Cross.

Ex parte WILSON and another.—In the matter of  
BENTLEY.

The counsel for the appellant, in applying for a special case, is bound to state to the Judge, who certifies it, the grounds of appeal; and the case itself should state the facts found by the Court, and not the evidence at length, by which the facts were proved.

THE counsel for the parties to this petition, Mr. *Dixon*, for the petitioners, and Mr. *Bethell*, for the assignees, appeared before Sir *John Cross*, for the purpose of settling a special case; but as the counsel could not agree, the learned Judge drew it up himself as follows, and made the annexed Order.

Court of Review.

*Ex parte Wilson and another.—In the matter of Bentley.*

The Court found and adjudged the facts of this case as follows:—

The petitioners are the holders of nine bills of exchange accepted by the bankrupts, to the amount of 20,000*l.* and upwards. These bills were accepted in consideration of so much money lent and advanced by the petitioners to the bankrupts, and to certain other persons who guaranteed the payment of the bills, to enable them, on their joint account, to purchase a quantity of cotton in the United States of America. The cotton so purchased was shipped to Liverpool, for and on account of the purchasers, who authorized an agent there to sell the same on its arrival, and apply the net proceeds in discharge of the said acceptances; and they at the same time gave notice thereof to the petitioners.



The cotton was accordingly sold; but the proceeds have not been so applied, nor any part thereof, in consequence of the assignees having given notice to the agent who holds the same, not to do so without their consent, which they still withhold. The acceptors, before the bills became due, were declared bankrupts, and their copurchasers became insolvent. The petitioners applied to the Commissioners, to prove their debt upon the bills, but the proof was rejected. The petitioners thereupon preferred their petition to this Court, praying, amongst other things, to be admitted to prove their said debt under the said fiat, without prejudice in any manner to their right and claim to and upon the proceeds aforesaid. Whereupon the Court, having fully heard and considered the proofs and allegations of the parties, and the arguments of counsel for the petitioners, in support of the petition, and for the assignees against it, hath ordered, adjudged, and decreed, that the petitioners shall be at liberty to go in under the fiat and prove their said debt against the estate of the said bankrupts, without prejudice in any manner to their right and claim upon the proceeds of the said cotton, and that the Commissioners in the said fiat shall receive and admit such proof accordingly. The counsel for the assignees insist, that the said order and decreè is erroneous, and contrary to equity, in this, that the petitioners ought not to be allowed to prove a debt to the full amount of the said bills, but for so much only, as may remain due thereon after deducting the proceeds in question.

Approved and certified by me,

*J. Cross, J.*

ORDER.

Let this special case be awarded, and let the appellants have a transcript thereof, to be carried into the

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Court of Appeal, and returned with its judgment thereon, authenticated by the proper officer, if that Court shall so think fit.

Sir JOHN CROSS.—The counsel for the appellants has objected to this case, because it does not set forth, in detail, certain letters and oral proofs adduced on the hearing of the petition, showing how the debt in question was contracted, and how it was charged on the fund therein mentioned; all which are inserted at great length in the case he has submitted to me for approval. And, in answer to my inquiries as to the grounds of appeal, he has protested against being called upon to state them, and insisted that an appellant is intitled, *ex debito justiciæ*, to have a special case certified and approved by one of the Judges, without giving him any intimation of the objections to the judgment. As I cannot concur with the learned counsel on either of these points, and as they have often before occasioned much difficulty in the settlement of special cases, to which the Judges are desirous to give every proper facility, I feel it to be my duty to explain the reasons for my opinion respecting them. Before the establishment of this Court, it was the practice, when parties were dissatisfied with the determination of the Vice-Chancellor, to obtain a revisal of it by the Lord Chancellor; and this was usually called an appeal, although it was, in a legal sense, only a rehearing, by the same Court, of all the same matters, whether of law, equity, or fact. But the legislature has made an essential change in this respect; which, however, appears to me not to be sufficiently attended to, especially by those most familiar with the former practice. This Court is a distinct Court of judicature; and an appeal lies from hence, as from every other Court in the realm, except

that of ultimate appeal. And the act (1 Will. 4. c. 56. s. 3.) directs, that the appeal from this Court shall be on matters of law and equity only, and on a special case, approved and certified by one of the Judges, whose determination, on the settlement of such case, shall be final and conclusive. It appears to me, therefore, that the adjudication of this Court, on all matters of fact, is final and conclusive, unless reviewed by the Court itself, on a re-hearing; and that a special case, like a special verdict, should state only the facts found, and not the evidence by which such facts were proved. This distinction between facts and evidence is familiar to all, who are conversant with the business of the Courts of Common Law; but it is not of such frequent occurrence in the Courts of Equity. It is, however, well established there, in the case of a bill of review, which is allowed on matters of law and equity only, arising on the facts stated in the decree, with one exception, not material to the present purpose. Such are my reasons, for thinking that a special case ought not to state any evidence of facts, whether oral, or documentary. And as to setting forth therein the grounds of appeal, I am of opinion, that I cannot properly approve any special case, in which it does not appear that the appeal is on some matter of law or equity, and not on any conclusion or inference of fact, nor on any latent matter, on which this Court has not been called upon to adjudicate. For the Court of Error would then, in effect, be required, not to exercise an appellate, but an original, jurisdiction over questions, on which no previous judgment had been passed. On the other hand, the counsel for the petitioners has objected altogether to the allowance of any special case, alleging, that the appeal has not been lodged, pursuant to the 32d section of the act, within a month after the

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determination of this Court. But I am of opinion, that it belongs to the Court of Appeal to determine, whether it comes regularly there, and in due time; and that that is a question, of which I cannot properly take judicial cognizance.

Westminster,  
April 19 1838,

Where the indorser of a bill becomes bankrupt, before it falls due, notice of its dishonour, if occurring before the choice of assignees, must be given to the bankrupt; if after such choice, to the assignees; to enable the holder to prove.

Ex parte CHAPPLE.—In the matter of PHILIP GANS.

THIS was a petition of the assignees, praying that two proofs for the sum of 11,465*l.*, and 1134*l.*, on various bills of exchange, might be expunged, on two grounds; first, that the bankrupt, who had drawn and indorsed the bills, on which the proofs were made, had acted merely as the agent of another firm; and, secondly, that no notice of the dishonour of the bills had been given, either to the bankrupt, or the assignees. The question of agency was not established by the petitioners; and they rested their case upon the want of notice of dishonour. It appeared, that some of the bills fell due and were dishonoured, between the adjudication of the bankruptcy and the choice of assignees, and that others fell due after the choice.

Mr. *Swanston*, and Mr. *Archbold*, appeared in support of the petition, and contended, that the omission to give notice of dishonour was fatal to the proof.

Mr. *J. Russell*, and Mr. *Bacon*, *contra*. No objection was made to the proof, on the ground of want of notice, before the Commissioner; and therefore it cannot now be entertained by the Court. And now the only evidence in support of the objection, as to want of notice, is, the affidavit of a clerk, who swears that he believes no

notice was given; but this is met by the affidavit of Mr. Woolley, who swears that he believes notice was given. Some of the bills did not become due until after the bankruptcy; as to these no notice was necessary; or, at least, the question of notice under these circumstances has never yet been decided (a).

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Mr. Swanston was not called on to reply.

ERSKINE, C. J.—In this case the bankrupt is the indorser of several bills of exchange; in respect of which his estate has not derived any benefit. It is incumbent on the Court, therefore, to scrutinize the legal rights of the holder, who now claims to prove these bills against the bankrupt's estate. The question, as to the agency of the bankrupt, appears to be in favour of the respondent; and he might have proved on these bills against the bankrupt's estate, if he had given proper notice of their dishonour; but the proofs must be expunged, for want of any evidence that such notice was given, either to the bankrupt, or the assignees. The decision of the Court will not, however, prevent the bill-holder from going again before the Commissioner, if he can establish the fact, that notice was given. It has been contended, that the objection of want of notice cannot now be taken, as

(a) In *Ex parte Smith*, 3 Brown, 1, Lord Thurlow held, that in the case of a bankrupt drawer or indorser, it was not necessary for the holder of a bill to give notice of its dishonour either to the bankrupt or his assignees. In *Rhodes v. Proctor*, 4 B. & C. 517, the Court of King's Bench decided, that when the house of the bankrupt drawer of a bill was kept open by an agent of his assignees, there notice was essential. In *Ex parte Moline*, 19 Ves. 216, Lord Eldon held, that notice given to a bankrupt drawer, before the choice of assignees, was sufficient notice, to entitle the holder to prove. And in *Ex parte Johnson*, 3 Deac. & C. 433, this Court held, that the holder was bound to use due diligence in giving notice to the bankrupt, or his assignees. And see 1 Deac. B. L. 244.

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it was not raised before the Commissioner; but an omission to urge an objection before the Commissioner, does not prevent its being taken here; for petitions to this Court, from a decision of the Commissioner, are not to be considered as appeals from an inferior Court. A case heard here on such a petition is, as to the merits, just as if discussed for the first time.

Sir JOHN CROSS.—The inclination of my opinion is in favour of the respondents, as to the question of agency. But I think the want of notice of the dishonour of the bills is a fatal objection to the proof, and that on this ground the proof must be expunged.

Sir GEORGE ROSE.—The principles, on which the right of proof is founded on a bill of exchange under a fiat in bankruptcy, are precisely those which regulate the right to recover on the bill in an action at law; and the same facts must be established in evidence. With regard to the question of agency, if the allegations contained in the petition had been supported by the evidence, I think the proofs would have been invalid, on that ground; but the evidence shows a different state of things; from which we may collect, that there was a sufficient consideration to support the proof. The Court, therefore, cannot expunge the proof, on that ground. Then, all that is further required is evidence of notice of dishonour of the bills; on which point this Court requires the same evidence, as would be necessary in an action at law. As no such evidence has been adduced, the proofs must be expunged, except as to the bill for 1491*l*. This is certainly a case, in which the strictest rules that govern the right of proof should be

adhered to; as the bankrupt's estate has received no benefit from these bills. The respondent, however, may go again before the Commissioner; if he can establish the fact of notice.

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ORDERED, that the proofs should be expunged, except as to the bill for 491*l.*, and that each party should pay their own costs.

Ex parte SIDEBOTHAM.—In the matter of CLARKE.

Westminster,  
April 20, 1838.

THIS petition was called on a few days back, when the petitioner's counsel, finding he could not support his case, declined to open the petition; upon which it was ordered to be dismissed, with costs.

After a petition is ordered to be dismissed with costs, because the petitioner declines to open it, the Court will not, on a subsequent day, entertain an application from him, to exclude from the allowance of costs certain affidavits of the respondent, on the ground that they were filed too late to be read. If the affidavits are not filed in time, the petitioner should open his petition, in order to take the objection as to their disallowance.

Mr. *Anderdon*, on behalf of the petitioner, now applied to the Court to vary the terms of the order, by excluding the costs of the affidavits filed by the respondents in opposition; on the ground, that as they were only filed the day before the petition was called on for hearing, they could not have been read. [*Sir George Rose*. The Court cannot vary an Order drawn up. There must be a petition for rehearing.] The Court has equal power to vary an Order when drawn up, as if it was merely in minutes. Besides, it was drawn up in our absence, and we had no notice to attend to settle the minutes. [*Ersine*, C. J. When a petition is dismissed with costs, the Order is considered so simple, that no minutes are drawn up; and therefore it would be idle, to give any notice to attend to settle them.] In that case, the Court ought now to treat

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the Order, as if it was in minutes. As the affidavits could not have been read, if the petition had been heard, the object of the present application is, to strike out of the Order the words "upon hearing the affidavits in opposition thereto."

Mr. *Twiss, contra*. The petitioner has no right to say that our affidavits could not be read, when he refused to open his petition.

ERSKINE, C. J.—This is a mere question of practice. It appears, that on the dismissal of a petition with costs, it is usual to insert in the Order the words "on hearing the affidavits in opposition," provided they are filed. Now a petitioner, by not opening his petition, cannot prevent the respondent from having the costs of his affidavits. If the affidavits are not filed in time to entitle them to be read, the petitioner must open his petition, in order to take the objection. The Order here appears to be in the usual form; and the rule is, that when a petition is dismissed with costs, all affidavits filed are included. If a petitioner thinks that any affidavits should be excluded, he should open the petition, and call the attention of the Court to the fact; when a special Order would be made, excluding such affidavits as were not filed in time. The petitioner may still apply for a rehearing, if he thinks it worth his while.

The other Judges concurring,

Motion refused, with costs.



ANONYMOUS.

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*Westminster,  
April 20, 1838.*

MR. *MONTAGU* applied to the Court to know what the practice was, upon a reference to the Registrar to appoint a trustee,—whether it was necessary, after the Registrar had made his report, to move that it should be confirmed.

Practice as to confirming the Registrar's report, on a reference to appoint a trustee.

ERSKINE, C. J., after consulting Mr. *Barber*, the Registrar, said, that where the Order was simply that the Registrar should appoint a trustee, it was not necessary to move that his appointment should be confirmed; but it was otherwise, when the Order was that the Registrar should select a trustee, and report his nomination to the Court.

Ex parte JOHN BARNES.—In the matter of WILLIAM MEDLEY, and ARTHUR OUVRY MEDLEY.

*Westminster,  
April 21, 1838.*

THIS was the petition of a legal mortgagee, praying that the assignees might be ordered to pay over to him the proceeds of the sale of certain crops of hay and clover from the mortgaged lands, under the following circumstances.

A legal mortgagee obtained the usual order for sale of the property; previous to which it was arranged between himself and the assignees, that he should be placed in the same situation as if he had given notice to the tenants:—*Held*, that the mortgagee was, under these circumstances, entitled to the

The mortgaged estate was conveyed by *W. Medley* to the petitioner by indentures of lease and release, dated respectively the 13th and 14th October 1827, and the 15th and 16th April 1830, subject to redemption on payment by *W. Medley* of the several sums of 15,000*l.* and 13,000*l.*, with interest at 4 per cent. At the time

crops growing on the estate at the time of the order of sale.

*Quere*, Whether, in the absence of any such arrangement, the mortgagee is not entitled to have the estate sold, in the same condition, as it stands at the date of the order for sale.

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of the issuing of the fiat, on the 31st January 1837, there was due to the petitioner on the mortgage the principal sum of 25,000*l.*, besides interest; part of the mortgaged estate being then in the possession of *W. Medley*, and the remainder being let to tenants. On the 12th April 1837, the solicitor of the petitioner wrote the following letter to the solicitors to the assignees:

“ *Re Medley.*

“ Gentlemen,

“ We have been expecting to hear from you on the subject of the estate at Iver in mortgage to *Mr. Barnes*. We think arrangements should be made for the sale, and we propose *Mr. Geo. Robins* as the auctioneer, who would be able to advise as to the propriety of accepting *Mr. Whittington's* offer for a part of the estate till Michaelmas, or for a term. If the estate be not let, some one ought to be put into possession to take care of it, which we will do, unless there be some one already there. We have no wish to interfere, as we have already stated to you, unnecessarily with respect to this property; but, to justify our non-interference, we must request to be favoured with a letter from the assignees, or from you on their behalf, agreeing that *Mr. Barnes* shall be entitled to the arrears of rent due at the bankruptcy, or subsequently to accrue. We shall be obliged by an immediate answer, as we understand that at this time of the year a little delay may occasion considerable damage.

“ We are, &c.

“ Messrs. *Jones & Ward.*

*Amory & Coles.*”

On the 19th April Messrs. *Amory & Coles* attended by appointment a meeting of the assignees and their solicitors, and discussed the proposed sale of the estate, and the right to the rent due, which the assignees then claimed, on the ground that there was not half a year's interest due at Lady-day; when it was agreed verbally, that the petitioner was to be in the same situation, as if he had given notice to the tenants on the 10th March. After this meeting, the solicitors to the assignees wrote to Messrs. *Amory & Coles* as follows:

*" Re Medley.*

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" Gentlemen,

19th April 1837.

" The assignees, after you left their meeting this morning, determined on the sale of the Iver estate in mortgage, and to employ an auctioneer in the neighbourhood, and I have named Mr. *Murray* of Uxbridge. With reference to our conversation this morning, as it may be satisfactory to you, we beg to say, that so far as the assignees are concerned, you are not to be prejudiced by our verbal communication on the subject of the rent of the estate, and shall be placed in the same situation, as if you had given notice to the tenants immediately after our interview of the 10th ultimo, supposing you then had a right, when no interest was due to your client, to give such notice.

" We are, &c.

*" Jones & Ward."*

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On the 3d June 1837, the Commissioner made the common order for the sale of the mortgaged property. On the 9th June the petitioner obtained an order for leave to bid at the sale of the estate. On the 23rd June the auctioneer, by the direction of the assignees, and with the concurrence of the petitioner, sold the grass and clover on the land, after which he sent the following letter to the solicitors of the petitioner :

" Uxbridge, June 23d 1837.

" Gentlemen,

" I this day sold by auction about sixty-nine acres of grass and clover upon the estate at Iver, and if it holds out near the quantities stated in the terrier, you will have to receive at least 220*l.*, after deducting the expense of selling.

" I am, &c.

*" W. Murray."*

The proceeds of the sale, however, did not realize more than 136*l.* 0*s.* 4*d.*, which sum being claimed by the assignees, the auctioneer paid over the amount to the official assignee. On the 3d July 1837 the estate was sold, when the petitioner became the purchaser for the sum of 12,200*l.*

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BARNES.

Mr. *Swanston*, and Mr. *Heathfield*, in support of the petition. The petitioner is clearly entitled to the rents and profits of this estate, independently of any agreement respecting them. But the letters, that passed between the solicitors of the petitioner and the assignees, amount to a virtual agreement that the petitioner should have the same right, as if he had given notice to the tenants of the estate on the 10th March.

Mr. *Burge*, and Mr. *Bacon*, *contrà*. The mortgagee is not entitled to the crops, or their proceeds, as he did not take possession of the estate before the bankruptcy; *Ex parte Temple* (a). [*Erskine*, C. J. Is not a legal mortgagee entitled to the same right, in this instance, as an equitable mortgagee ?] The observations of Sir *John Leach* in *Ex parte Temple*, are not of such little importance, as to induce this Court to overrule them. Until the mortgagee enters, the mortgagor is *quasi* tenant to the mortgagee. The order of sale is not to be treated like an entry of the mortgagee. In *Ex parte Temple* Sir *John Leach* says, that the mortgagee is not entitled to emblements, where the growing crops have been carried off by the mortgagor before the mortgagee obtains possession, and between the time of his demand and the recovery of the possession. [*Erskine*, C. J. The reason assigned by Sir *John Leach*, in the latter part of his judgment in that case, is not correct in law; for it has been held in *Hodgson v. Gascoyne* (b), that a mortgagor can recover the emblements after a judgment in ejectment, if they are sold, or seized, subsequent to the day of the demise laid in the declaration.] That case is certainly referred to by the reporters, in a note on the judgment of

(a) 1 G. &amp; J. 216.

(b) 5 B. &amp; Ald. 88.

Sir *John Leach*. But what we contend for in the present case is, that the order of the Commissioner for the sale of the property is not equivalent to an entry. This was expressly decided by this Court in *Ex parte Living (a)*, where the Court drew this distinction between the rights of a legal, and an equitable, mortgagee: "An equitable mortgagee," it is there said, "cannot enter on the premises, and is therefore obliged to apply for the interposition of this Court to direct a sale; and he is held to be entitled to the rent, from the time of the order for sale; because he might then have a receiver appointed the moment he asked it; and the order for sale therefore is considered as equivalent to the appointment of a receiver. But a legal mortgagee can enter, if he chooses, immediately on the forfeiture, and must stand on his legal right; he has already sufficient advantages over the other creditors." [*Erskine*, C. J. What do you say to the agreement by letter between the parties?] That agreement was only as to the *rents*; and the special mention of "rents," without in any manner alluding to the "crops," is against the claim of the petitioner. [*Erskine*, C. J. The question is, whether, when the order for sale was made, the estate was not to be sold in its then present state, with the crops growing on it, and as they then stood. In *Ex parte Living* the rents and profits accrued some time after the order for sale; that may make a difference.] If the Court will look at the different dates in this case, they will find that there was ample time for the petitioner to have entered on the property before the order for sale; for the fiat was issued on the 31st January, and the order for sale was not made till the 3d June. On the 9th June the petitioner ap-

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(a) 1 Deac. 1.

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plied for leave to bid, without making any claim to the growing crops, which he might then have done. A legal mortgagee, in the exercise of his right of entry on the property, can do what an equitable mortgagee cannot,—although in some respects an equitable mortgagee is in a better situation, for he can have an order for sale, while a legal mortgagee can only have a decree for a foreclosure.

Mr. *Swanston*, in reply. It is plain, that the mortgagee in this case, from certain expressions in the letters that passed between the two solicitors, must have claimed the crops themselves; for in the letter of the 12th April, the solicitors of the mortgagee require that some person should be immediately put into possession of the estate, to take care of it, alleging, that at that time of the year a little delay might occasion considerable damage. And it may also be collected from the correspondence, that the rights of the mortgagee were not to be prejudiced from his forbearing to enter on the property, or interfere with the management of it previous to the actual sale.

ERSKINE, C. J.—The question to be decided on this petition arises under very peculiar circumstances, which do not bring before the Court the general question, as to the rights of a legal mortgagee to the crops after an order for sale, but merely call for a decision of the case on its own special grounds. When the order for sale was made, the crops were upon the ground; the sale did not take place immediately, but some delay took place, and a correspondence ensued between the solicitors of the respective parties, from which it appears, that it was agreed that the mortgagee should stand in the same po-

sition as if he had taken possession of the property, or given notice to the tenants. This agreement, therefore, rendered it unnecessary for the mortgagee to take the usual steps, in order to entitle him to the rents and crops; and, at the same time, relieves the Court from adverting to the law of the case. But, if it had not been for *Ex parte Living (a)*, I should have entertained very little doubt on the general question, namely, that, in point of law, the mortgagee was entitled to have the estate sold in the same condition, as it stood at the date of the order of sale. When a mortgagee, however, as in the present case, gives notice to the assignees, that he would put some man in possession to take care of the property, if the assignees did not, this affords a pretty strong presumption that the estate was claimed as it then stood.

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Sir JOHN CROSS.—I entirely agree with his Honor the Chief Judge. This case stands on its own peculiar circumstances, and will not interfere with the decision in *Ex parte Living*. The estate was treated by the mortgagee as an available property, of which he had the right to immediate possession. Was not the auctioneer selling, in pursuance of an order which the mortgagee had obtained, and acting, therefore, as the agent of the mortgagee? It is clear he himself thought so; for when the crops were sold, he wrote to the solicitors of the mortgagee, informing them that they would have to receive a certain sum, which he expected would be realized from the sale; the assignees having then made no claim to the crops, or to the proceeds of the sale of them. It was, in my opinion, the clear understanding of the parties, that the crops were to be considered, as well as the land,

(a) 1 Deac. 1.

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the property of the mortgagee; and we ought to carry their intention into effect by our present order.

Sir GEORGE ROSE.—The case of *Ex parte Living* stands upon sound principles of law. The present case depends upon its own peculiar circumstances; and I concur in the Order proposed to be made, as carrying into effect the plain intention of the parties.

ORDERED as prayed; the costs of the petition to come out of the proceeds, and the costs of the assignees out of the bankrupt's estate.

Westminster,  
April 21 and 23,  
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It is of course, to annul a fiat, with costs, for want of prosecution, on the application of the bankrupt, unless the petitioning creditor presents a petition for further time to open it.

Ex parte JONES.—In the matter of JONES.

THIS was the petition of the bankrupt, to annul the fiat, on the ground that he was not indebted to the petitioning creditor, and that the time had gone by for opening the fiat.

Mr. *Sturgeon*, for the petitioner.

Mr. *Bethell*, *contrà*. The delay in opening the fiat was at the express request of the bankrupt, who has made this application, in direct breach of an engagement made with the petitioning creditor.

Sir GEORGE ROSE.—We cannot be a party to any arrangement between the bankrupt and the petitioning creditor.

ERSKINE, C. J.—The order to annul, for want of pro-



secution, is of course, unless the petitioning creditor presents a cross petition for leave to open the fiat; notwithstanding the time for opening has elapsed. The case, however, may stand over for a few days, to enable him to do so, if he thinks proper.

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Mr. *Bethell* now said, that no cross petition was presented by the petitioning creditor; but that if the Court annulled the fiat, he hoped it would not be with costs, the bankrupt not being entitled to costs, as of course. The petitioning creditor insists on the validity of his debt.

April 23.

ERSKINE, C. J.—On a petition to annul, for want of proceeding to adjudication, it is irrelevant matter, to allege that there is no petitioning creditor's debt; for, before adjudication, no question can be raised with respect to the petitioning creditor's debt. Therefore, so much of the petition as relates to this allegation may be dismissed, with costs; although the fiat must be annulled, at the costs of the petitioning creditor.

Sir GEORGE ROSE.—It should be distinctly understood, that if a petitioning creditor enters into any arrangement with the bankrupt, as to postponing the opening of the fiat, it is at the peril of its being annulled, with costs; unless the arrangement is made with the concurrence of the other creditors.

The COURT finally determined, that as it would be difficult to separate the costs of so much of the petition as related to the petitioning creditor's debt, and so much as related to not opening the fiat in time, they would not give any costs on either side.

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**Ex parte THOMAS BOOKER.—In the matter of JOSHUA  
RAWLINS.**

*Westminster,  
April 23, 1838.*

Where one of two assignees petitioned to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt, but the other assignee was willing to prosecute it; the Court refused to annul the fiat, as another petitioning creditor's debt might be substituted; but permitted the petitioner to be discharged from the office of assignee, upon payment of costs.

**THIS** was the petition of one of the assignees to annul the fiat, on the ground that there was a bad petitioning creditor's debt, and that the act of bankruptcy was concerted. The debt, on which the fiat was sued out, arose on a claim by a trading establishment, called the "Tuscan Building Company," which was not incorporated by any act of parliament. The bankrupt was a shareholder in this company, and the petitioning creditor was the acting agent or officer. The petitioner alleged, that it would be unsafe for him to co-operate in the working of this fiat; as he should be unable to maintain its validity in any action at law, that might be deemed necessary to be brought for the recovery of certain property of the bankrupt, which had been removed from his house the very day the fiat issued, namely, on the 28th November 1837. It appeared, however, that the petitioner, after being chosen assignee, took part in all the subsequent proceedings under the fiat, and did not present this petition until the 9th February last, which was after the bankrupt had passed his last examination.

Mr. *Swanston*, and Mr. *K. Parker*, in support of the petition. The bankrupt, being one of the shareholders in this company, must be considered a partner with the other shareholders; and one partner cannot sue out a fiat against another, on a partnership debt; *Ex parte Gray (a)*. Another point is, that there was no act of parliament authorising this company to sue by one of

its public officers ; and even if there were, it does not follow, that because a public officer of a company is authorised to sue, he is therefore authorised to take out a fiat ; *Guthrie v. Fisk* (a).

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Mr. *Bethell*, for the petitioning creditor. The present application is made by only one of the assignees, and it is against the wishes of all the other creditors. The other assignee is willing to prosecute the fiat at his own risk. But the Court will not, in any case, on the application of an assignee, annul a fiat, without an undertaking to sue out another fiat. In *Ex parte Graves* (b) Lord *Eldon* said, that an application of this nature should be watched with great jealousy ; and though he alludes to cases where assignees, finding they could not support the commission by the act of bankruptcy on the proceedings, have procured it to be superseded, yet it was for the purpose of a new commission being issued, upon a subsequent act of bankruptcy. In the present case, the petitioner is estopped from impeaching the validity of the fiat ; for he was a party to various proceedings under it after he was chosen assignee, and laid by till the 9th February, before he presented this petition.

Mr. *Flather* appeared for the other assignee.

Mr. *Swanston*, in reply. In answer to the statements of the other side, as to Lord *Eldon*'s observations upon applications of this description, I recollect that Lord *Eldon* has said, it was the first duty of an assignee, to come to the Court for advice and assistance, when he found that the petitioning creditor could not support a

(a) 3 B. & C. 178.

(b) 1 G. & J. 86.

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commission. It so happens, that in *Ex parte Graves*, which has been cited by the other side, the assignees were aware of the defect in the ingredients to support the commission, before they were chosen assignees; and that circumstance induced Lord *Eldon* to remark, that the application there made was to be watched with jealousy. But in that very case Lord *Eldon* says, "it is the first duty of the assignees to satisfy themselves, that the commission is well founded." I deny the proposition, that an assignee cannot come to supersede, without offering to sue out another fiat. Then, as to the argument of the petitioner being estopped from applying to supersede this fiat,—will the Court, on the ground of personal estoppel, compel an individual to commit an injustice, by prosecuting a fiat that is clearly invalid? Personal estoppel in these cases only applies to the bankrupt, who has acquiesced in the proceedings under a fiat, but not to a creditor, or the assignees. It does not apply to the case of an officer of this Court, coming to the Court to complain of the abuse of its process.

ERSKINE, C. J.—If this had been the petition of the bankrupt, or a creditor other than an assignee, it would have been the duty of the Court, to call on the petitioning creditor to support the fiat. But here the application is made by one only of the assignees, while the other assignee makes no objection whatever to the validity of the fiat. The alleged defect in the act of bankruptcy does not appear, from the evidence, to be sufficient to call on the Court to supersede the fiat. It is contended, that the act of bankruptcy was concerted; but, when it appears from the evidence in the case, that the bankrupt was insolvent, and kept out of the way, the

Court cannot say that there was no intention on his part to delay his creditors. And the act of bankruptcy would be clearly good, if set up by any other petitioning creditor upon a substituted debt. It is then said, there is no good petitioning creditor's debt; but the other assignee is willing to support the fiat; and a debt could be substituted, by applying to another creditor. In *Ex parte Graves* (a) Lord Eldon said, that he should not be disposed to favour petitions of this nature, unless it be manifest, that the assignees have done all in their power to support a commission, before they apply to supersede. But here the assignee has taken no steps whatever to support the fiat, by applying to any other creditors to substitute a debt; but, in consequence of a dispute relative to the appointment of a solicitor, has made it his object to overturn the fiat, not wishing to do his duty for the benefit of the estate. In a case of the doubtful validity of a fiat, the Court has no wish to keep an assignee in office, against his will; and it would be right to supersede, if there was no other way of allowing him to retire and avoid the difficulty. But, in all cases, where an assignee complains of the jeopardy in which he is placed, he can be relieved from all responsibility, by applying to be removed; and, in the present case, the other assignee and the creditors are entitled to support the fiat, if possible, at their own risk. Then comes the question of costs. If *Booker* had been ignorant of the facts—if he had not been cognizant of the defects of the fiat, on his accepting the office of assignee, then the Court would have relieved him from paying the costs of this application. But here the assignee, knowing all the circumstances of the alleged invalidity of the fiat, chose

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(a) 1 G. &amp; J. 86.

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to take upon himself the office. That was no reason why he should be retained, but it is a good reason why he should pay the costs of his removal.

Sir JOHN CROSS.—There are two questions which have been brought before the Court in this case, 1st, as to the validity of the act of bankruptcy; 2ndly, as to the validity of the petitioning creditor's debt. I say nothing as to the act of bankruptcy—there is conflicting evidence on that point; and therefore I express no opinion on the subject. As to the petitioning creditor's debt, however, it is admitted to be bad. It becomes then a question for our consideration, whether we are to compel a party to go on working a fiat, that is decidedly invalid. In the first place, let us inquire a little into the right of this petitioner to apply to supersede, under these circumstances. The petitioner, it appears, is a creditor, as well as an assignee; and I have yet to learn, that he is to be deprived of his rights of a creditor, because he is an assignee. It is proved, that the solicitor was appointed by the consent of both assignees. It does not appear, that the petitioner had any knowledge of the badness of the petitioning creditor's debt, before he was elected an assignee; and, that being a question of law as well as of fact, it was necessary that the petitioner should have time to inquire into the validity of it; and it appears to me, that two months is not an unreasonable time for that purpose. I can discover no laches or misconduct on the part of the petitioner, to prevent him from making this application. It is then suggested, that it is incumbent on the assignee to go in quest of a creditor, for the purpose of substituting another petitioning creditor's debt. But, in my opinion, it is no part of the duty

of an assignee, to go in search of a creditor, to bolster up an invalid fiat; for it is not suggested here, that the present fiat is a good one. It strikes me, that the best Order we can make is, to supersede this fiat, unless another creditor shall, within a given time, come in and apply to substitute another debt. According to the doctrine laid down in *Ex parte Graves*, it is the duty of an assignee to clear away every doubt as to the validity of a commission. The assignee, in this case, has cleared away every doubt, by showing that the petitioning creditor has no power to support the fiat. It seems to me, that the assignee has acted right in all respects, and in perfect accordance with the principles of Lord *Eldon's* judgment in *Ex parte Graves*. Then as to the costs—is the petitioner to be at the costs of this petition, for doing what he considered his duty, in pointing out the invalidity of the fiat to the Court? And is the other assignee, and the petitioning creditor, to put their hands into the bankrupt's pocket, and help themselves to the costs, at the expense of the bankrupt's creditors? The other assignee revokes the appointment of the solicitor to the fiat, which I think he had no right to do, without the consent of the petitioner; and he then appoints the solicitor of the petitioning creditor to be solicitor to the fiat; a proceeding, which appears very like collusion between the other assignee and the petitioning creditor.

Sir GEORGE ROSE.—If an assignee comes *bonâ fide* to the Court, and proves that there is no trading, or no act of bankruptcy committed by the bankrupt, it would be ridiculous, of course, to say, that under these circumstances the Court would support a fiat, for which there would be no foundation. But the practice has

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always been, when assignees came and challenged the validity of a commission, that it was deemed to be a sufficient answer, for the petitioning creditor to tender an issue, or an inquiry, to be taken by him at his own hazard, in respect to the validity of the commission. In the present case, my impression is, that the object of the assignee, in presenting this petition, was not a *bonâ fide* object, and that his real motive was, not to call for the protection of the Court, but to take advantage of a technical defect appearing on the face of the proceedings, for the purpose of superseding the fiat. And I think this is not a case, in which the Court ought to lend itself to the views of the petitioner. If the petitioner chooses to take an Order to be discharged from being assignee, he is at liberty to do so, at his own costs, not including, however, the costs of this petition.

Mr. *Swanston*, wishing for time to consider this suggestion of the Court,

The ORDER was, that the petitioner should have a week to consider, whether he would be discharged from the office of assignee; and if he decided in the negative, that the petition should be dismissed, but without any costs on either side.

Westminster,  
April 24, 1838.

Ex parte BRIGGS.—In the matter of WINCHESTER.

The solicitor to  
the fiat, who  
was a mortgagee  
of the bankrupt's  
estate,  
obtained leave to bid  
at the sale.

THE petitioner, in this case, was solicitor to the fiat, and he had also a mortgage on the bankrupt's estate for But *quære*, whether he can have leave to purchase.



6000*l.*, which had been previously mortgaged to Messrs. *Coutts & Co.* for 20,000*l.* An Order having been obtained for the sale of the estate,

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BRIGGS.

Mr. *Montagu*, on the part of the solicitor, moved for leave to bid at the sale, for the purpose of protecting his private interests, as mortgagee.

ERSKINE, C. J.—I doubt whether the petitioner can ask for such an Order. I think an application of this nature has been refused, when made by the solicitor to the fiat.

Mr. *Montagu* said, the sale would be conducted by Messrs. *Coutts'* solicitor.

Sir JOHN CROSS.—The object of bidding is to purchase; and that would be irregular in the solicitor.

Sir GEORGE ROSE.—I see no reason why the petitioner might not protect his own interests, if a solicitor was appointed by the Commissioner to manage the sale.

The COURT finally ordered, that the petitioner might be at liberty to tender provisional biddings, for the purpose of protecting his own interests, reserving all further considerations until after the sale; and that the Commissioner should nominate a solicitor to conduct the sale.



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*Westminster,*  
*April 20 and 24,*  
1838.

On a petition by the bankrupt to annul, for want of an act of bankruptcy, the respondent must prove the affirmative.

Any new depositions taken before the Commissioners, upon a reference back to them to review the adjudication, will be admissible in evidence to support the fiat.

**Ex parte WELDEN.**—In the matter of WELDEN.

**THIS** was the petition of the bankrupt, to annul the fiat, for want of a sufficient act of bankruptcy.

**Mr. Montagu, and Mr. Girdlestone,** in support of the petition, called on the respondent to establish the act of bankruptcy.

**Mr. Swanston, and Mr. Bethell,** for the petitioning creditor, admitted it to be the practice, in general, for the petitioning creditor to prove an act of bankruptcy; but contended, that he was not bound to do so in the present instance, inasmuch as the bankrupt does not allege in his petition, that he has not committed an act of bankruptcy; but merely says, that there is no act of bankruptcy on the proceedings.

**ERSKINE, C. J.**—But that does not exonerate the petitioning creditor from the obligation of proving the affirmative.

The Court then desired the proceedings to be handed in for their inspection; but they were not forthcoming; upon which the Court said, that the assignees were bound to produce the proceedings, as directed by the fiat at the foot of the petition; and as they had not done so, the petition must stand over for that purpose, the assignees paying personally the costs of the day, unless they can show a valid excuse for not producing the proceedings; in which case, if the fiat should stand good, they might make a special application to be allowed the

costs out of the estate. The bankrupt must not, at any rate, bear the expense.

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Upon the petition being called on this day, and the proceedings being produced,

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Mr. *Swanston*, and Mr. *Bethell*, contended, that the statement of the bankrupt, in his own petition, showed an equivocal act of bankruptcy.

Mr. *Twiss*, for the assignees, said, they found they were in a situation of difficulty, and wished a reference back to the Commissioners to review the adjudication.

Mr. *Montagu*, in reply.

Sir GEORGE ROSE.—On looking at the deposition of the act of bankruptcy on the proceedings, it does not quite establish an act of bankruptcy, in point of form; as the deposition does not go quite far enough. But, as an affidavit has been made of another act of bankruptcy, the case ought to go back to the Commissioners to review the adjudication; when they may receive further evidence as to the validity of any act of bankruptcy. The bankrupt should have liberty to attend before the Commissioners, and will be entitled to his costs.

Sir JOHN CROSS thought there was no necessity for a reference to the Commissioners, as the Court might itself hear further evidence of an act of bankruptcy.

ERSKINE, C. J.—Any evidence, which this Court now receives as to the act of bankruptcy, would not consti-

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tute part of the proceedings, and therefore would not be evidence in support of the fiat elsewhere. But any new depositions taken before the Commissioners would be such evidence, as they would be filed with the proceedings; and therefore it seems desirable, that the matter should go back to the Commissioners.

The ORDER was, that the Commissioners should review the adjudication as to the act of bankruptcy, the petitioner to be at liberty to attend such inquiry: That all parties might take their costs out of the estate, if the Commissioners should find an act of bankruptcy to have been committed; with liberty for any party to apply to the Court, upon the result of the inquiry before the Commissioners.

Westminster,  
coram  
Ld. Chancellor.  
April 28, 1838.

The Court of Review has not jurisdiction to order the specific performance of a contract against a purchaser at a sale, which took place under the common order made by that Court, on the petition of an equitable mortgagee.

Ex parte JOHN CUTTS.—In the matter of JAMES GOREN.

THIS was an appeal to the Lord Chancellor from the decision of the Court of Review in *Ex parte Brettell*, (see *ante*, p. 111,) on the following

#### SPECIAL CASE.

On the 10th June 1834, a fiat in bankruptcy was issued against *James Goren*, under which he was declared a bankrupt, and *Edward Edwards* was appointed official assignee, and *John Sowerby*, *Lewis Cubitt*, and *Julius Anderson*, were chosen by the creditors to be,

and were appointed, assignees of the bankrupt's estate and effects.

On the 12th July 1834, *Thomas Brettell* and *Joseph Platts* presented a petition to the Court of Review in the matter of the said bankruptcy, whereby, after stating the several matters in the said petition contained, and alleging that they had an equitable lien by way of mortgage upon the manor of Chertsey Bermond, in the county of Surrey, which was part of the said bankrupt's estate, for the sum of *3676l. 12s.*, they prayed the said Court to declare that they were entitled to such lien by way of mortgage, and that the said manor might be sold before the Commissioner named in the said fiat, with the usual directions, and liberty to the said petitioners to bid; and that the said Commissioner might be directed to compute what was due to the said petitioners for principal and interest; and that the money to be produced by such sale might, after payment of the costs of the said petition and sale, be paid to the said petitioners, and applied in satisfaction, so far as the same would extend, of what should be found due to them as aforesaid, and that all usual and proper directions might be given.

By an Order of the said Court of Review, made in the above matter on the 25th July 1834, upon hearing the said petition, it was declared, that the said petitioners were equitable mortgagees of the said manor, with the appurtenances; and it was ordered, that it should be referred to the Commissioner of the Court of Bankruptcy acting in the prosecution of the said fiat, to take an account of the principal and interest due to the said petitioners; and that the said manor, with its rights, members, and appurtenances, should be sold before the said Commissioner, of which due notice was to be given

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in the London Gazette, and such other public papers as he should think fit; and that such sale should be conducted by the creditors' assignees under the said fiat; and that all proper parties should join in such sale, and in the conveyance or other assurances thereof to the purchaser, as the Commissioner should direct; and that the money to arise from such sale should be applied, in the first instance, in payment of the expenses attending the said sale, and the proceedings incident thereto, and of the costs of the said petitioners and the said assignees, and then in payment to the said petitioners of what should be found due to them as aforesaid; and the surplus of the proceedings should be paid over to the official assignee under the said fiat.

In pursuance of the said order, and after notice of the sale according to that order, the said manor was, on the 18th September 1834, put up for sale by public auction, at the auction mart of London, subject to certain conditions contained in a printed particular then and there exhibited, and by which the sale was stated to be "by order of the Court of Review in Bankruptcy;" and by the third of such conditions it was provided, that the purchaser should pay a deposit, in the proportion of 15*l.* per cent. of the purchase-money into the hands of the auctioneer, and sign an agreement for payment of the remainder to the vendors on the 18th October then next, at the office of Messrs. *Burgoynes* and *Thrupp*, the solicitors to the assignees, at which time and place the purchase was to be completed, and from which time the purchaser was to be considered entitled to the rents of the manor, the vendors taking them up to that day, and clearing the outgoings, if any, up to that period; but

that, in case from any cause whatever, the purchase should not be completed on the 18th October, the purchaser should pay interest to the vendors on the balance of the purchase money remaining unpaid (unless the vendors should think fit to annul the sale, on account of the nonpayment of such purchase money,) after the rate of 5*l.* per cent. per annum, from that day to the time the purchase should be actually completed; and by the last of such conditions it was stipulated, that if any mistake were made in the description of the premises, or any other error whatever should appear in the particulars of the estate, such mistake or error should not vitiate or annul the sale, but a compensation or equivalent should be given or taken, as the case might require, such compensation or equivalent to be settled by two referees, or their umpire; each party, within ten days after the discovery of the error by either party, and notice thereof given to the other party, to appoint one referee by writing; and in case either party should neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone might make a final and binding decision; and if two referees were appointed, they should nominate an umpire before they entered upon business; and the decision of such referees or umpire (as the case might be) should be final and binding.

Mr. *John Cutts*, of Witham, in the county of Essex, solicitor, was the highest bidder for, and declared the purchaser of, the manor for 3600*l.*; and he thereupon paid the sum of 540*l.* to the auctioneer, by way of deposit, and signed an agreement annexed to one of the said printed particulars of sale, and referring thereto,

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and which memorandum was in the words and figures, or to the purport and effect following (that is to say):—

“Memorandum.—I hereby acknowledge to have purchased the manor of Chertsey Bermond, as described in the annexed particular, at the sum of 3600*l.*; and having paid the sum of 540*l.* as a deposit, and in part payment thereof, I further agree to pay the remainder of the said purchase money, and complete my contract according to the conditions of sale; and I bind my heirs, executors, administrators, and assigns, to a strict fulfilment of the same. As witness my hand, this 18th day of September 1834.”

Soon after the sale, an abstract of the title to the manor was delivered to *John Cutts*, who took various objections thereto, which the solicitors of the assignees, as the vendors, answered, but with which answers *John Cutts* was dissatisfied; and many communications, and much correspondence and discussion took place between *John Cutts*, and the solicitors of the vendors, relative to such objections, and divers conferences were, from time to time, had between him and his counsel, and the counsel and solicitors of the vendors, on the subject of such objections, but without producing any satisfactory result.

A petition was lately presented to the Court of Review in the matter of the bankruptcy by *Thomas Brettell*, (who has survived *Joseph Platts*,) and the said *Edward Edwards*, *John Sowerby*, *Lewis Cubitt*, and *Julius Anderson*, stating, among other things, the facts hereinbefore stated, and alleging that a good title to the said manor and premises had been long since made and exhibited to *John Cutts*, except only, that so far as the actual particulars of the two kinds of copyhold properties holden of the manor may, in number, and extent or value, fall short of the representation of the said parti-



cular of sale, and a ground for compensation thereby arise; that the last named petitioners were, and had been, ready and willing that a proper compensation, by way of abatement or deduction from or out of the said purchase money, should be made to *John Cutts*, as provided by the conditions of sale; and thereby praying that *John Cutts* might be ordered specifically to perform the said contract of purchase entered into by him, and to pay to the petitioners, or to such of them as, under the order of the 25th July 1834, or the directions given in pursuance thereof, were or might be entitled to receive the same, the sum of 3,060*l.*, (balance of the purchase money of 3,600*l.*.) with interest thereon from the said 18th October 1834, after the rate of 5*l.* per cent. per annum, subject to the deduction or allowance of such (if any) compensation or abatement as, in the judgment of the Court, *John Cutts* might be justly entitled to; the petitioners offering, on such payment being so made, to account to *John Cutts* for the profits of the manor accrued and received by them since the 18th October 1834, and to convey the manor unto *John Cutts*, or as he might direct, and otherwise generally to perform the contract, so far as the same remained on their part to be performed; and that, if necessary, it might be referred to the proper officer of the said Court, to ascertain and state whether the petitioners could make a good title to the manor, and whether *John Cutts* was entitled to any compensation by way of abatement or deduction from or out of his purchase money, and on what ground or grounds, and if so entitled, then to ascertain and fix what ought to be the amount of such compensation or abatement; and that all necessary and proper directions might be given for the purposes aforesaid; and that *John Cutts*

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might be ordered to pay to the petitioners their costs of the same petition, and incident thereto, and consequent thereon.

The last mentioned petition came on to be heard on the 30th January 1838, in the Court of Review; when, after hearing counsel for the petitioners and *John Cutts*, and the petition and affidavits filed in support of, and in opposition thereto, it was by the Court ordered, that it should be referred to *Francis Gregg*, Esq., an officer of the Court, to ascertain and state whether the petitioners could make a good title to the manor; and if he should find that the petitioners could make a good title, then that he should state to the Court, when it was first shown that such good title could be made, and whether *John Cutts* is entitled to any compensation by way of abatement or deduction from or out of the purchase money, and on what ground or grounds, regard being had to the conditions of sale; and that if he should find that *John Cutts* was so entitled, then that he should ascertain and fix what ought to be the amount of such compensation or abatement; and that for better making the said enquiries, all necessary and proper parties should be examined before the said *Francis Gregg*, upon interrogatories or otherwise, touching the matters in question, as he should think fit, and should severally produce before him, upon oath, all books, papers, and writings in their custody or power relating thereto, as he should direct; and the Court reserved the consideration of all further directions on the matters of the same petition, and also the costs of all parties of, and occasioned thereby, until after the said *Francis Gregg* should have made his certificate; and the parties were

to be at liberty to apply to the same Court, as they should be advised.

Upon the hearing of the petition, the counsel of *John Cutts* objected to the jurisdiction of the Court of Review, and insisted that if even the Court had jurisdiction, the directions of the same order were contrary to law.

The question is, whether the said Court of Review had power to make the said Order of the 30th day of January last.

William Lee for the appellant *John Cutts*.

James Bacon for the petitioners, respondents.

Sir Charles Wetherell, and *Mr. Lee*, for the appellant.

The Court of Review had no power to make the order of the 30th January 1838, either by statute—by usage or authority—or by the submission of the party to its jurisdiction.

1st. As to its power by statute. The jurisdiction of the Court is conferred and defined by the 1 & 2 *Will.* 4. c. 56. s. 2., which declares, that the Court “shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy, *as now usually are, or lawfully may be, brought by petition, or otherwise, before the Lord Chancellor*, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere. The question is, therefore, whether the Lord Chancellor, sitting in bankruptcy, had jurisdiction to make such an order as that which is the subject of the present appeal. The Lord Chancellor’s jurisdiction in bankruptcy is derived from the statutes of 34 & 35 *Hen.* 8. c. 4. and 13 *Eliz.* c. 7.

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By the first of these statutes it was enacted, that the Lord Chancellor, or Lord Keeper, and several officers of state, and other persons, should have power and authority over the persons and property of bankrupts, and cause sale to be made for satisfaction of their creditors. The 13 *Eliz.* c. 7. made a new provision, under which the Lord Chancellor, or Lord Keeper, was to appoint Commissioners, who were to have certain powers over bankrupts and their property. Is any thing to be found in these statutes, which declares that the Lord Chancellor, sitting in bankruptcy, was to preside in a new Court of Equity? Or, can it be supposed, that the legislature intended to erect an equitable jurisdiction as to a bankrupt's estate, in addition to the Court of Chancery, at a time long before the jurisdiction and practice of that Court were satisfactorily defined? It is an undoubted position of English jurisprudence, that nothing but an act of parliament, or prescription, can confer the powers of a Court of Equity. The Crown cannot create such a Court by letters patent; 4 *Inst.* 78; *Earl of Derby's case*, 12 *Rep.* 114, 3d Resolution. It is clear, therefore, that the Lord Chancellor, sitting in bankruptcy, had no right to exercise the powers of a Court of Equity.

2dly. The Court of Review has no power, by usage or authority. By the 1 & 2 *Will.* 4. c. 56. s. 2. the Court of Review is only invested with such powers, as usually were, or lawfully might be, exercised by the Lord Chancellor. The question is, therefore, whether any such power as now contended for, was usually, or ever, whether rightfully or wrongfully, exercised by any Lord Chancellor sitting in bankruptcy? The answer is easy—there is no instance of any such power having been exercised.

There is no vestige to be traced of an order by any Lord Chancellor, in his ministerial capacity, in respect of the bankrupt laws, for the specific performance of a contract, where the purchaser contended that the assignees had not a good title. The design of the stats. of *Hen. 8.* and *Eliz.* was, that arrangements should be made for the benefit of persons having claims against insolvent traders; and the proposition, that the Chancellor or Keeper of the Great Seal, sitting in bankruptcy, had a jurisdiction over persons not claiming the benefit of these statutes, cannot be supported, without disregarding the opinions which have prevailed from the period when these statutes were enacted, down to the time when the Court of Review was established. So far from such jurisdiction having ever been assumed by any Chancellor, every Chancellor has uniformly avoided exercising it. The jurisdiction in bankruptcy affected, 1st, the Commissioners, who were appointed by the Chancellor; 2dly, the bankrupt, against whom the proceeding was directed; 3dly, the assignees, who were to manage the estate; and 4thly, the creditors, who claimed the benefit of the commission. The orders in bankruptcy, made by the most eminent Chancellors, have been confined to these classes of persons,—and for this reason, that there was not any right of appeal against an order in bankruptcy. That consideration induced Lord *Hardwicke*, and successive Chancellors, to decline deciding doubtful or difficult points, even in cases which were clearly within the jurisdiction in bankruptcy, and to refer them to Courts from which there was an appeal to the House of Lords. Thus in *Bromley v. Goodere(a)*, where the question was, whether creditors under a commission were entitled to

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(a) 1 Atk. 75.

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interest on their debts, which was clearly within the jurisdiction in bankruptcy, Lord *Hardwicke* said, "It came before me originally upon petition; and even then my first apprehension was, that it would bear no great doubt; but as it was insisted there was no just foundation for the demand, and that if I determined it that way, my determination would have been subject to no appeal, I chose to have it come before me by way of bill." And in the matter of the *Earl of Litchfield* (a), which involved a question between two assignees, Lord *Hardwicke* said, "All the Court can do in a summary way under a commission of bankrupt is in transactions between the creditors and assignees; but it cannot, upon petition, adjust any demands that one assignee may set up against another, concerning a private contract between themselves, independent of the rest of the creditors." In *Ex parte Bennett* (b),—which was a petition to set aside the sale of an estate of the bankrupts purchased by a stranger to the commission, on the ground that the solicitor to the commission had effected the purchase,—although the real purchaser, General *Harris*, submitted to the jurisdiction, Lord *Eldon* said, "It is clear, this not being a purchase by a person, whose conduct under the commission falls to be controlled in bankruptcy, the proceeding ought to be by bill. The parties suggest, that they are willing to be bound by the judgment in bankruptcy; but I doubt whether I ought to accept the offer; the case involving considerations of great nicety and great importance." In the cases also upon short bills, it is plain, from what Lord *Eldon* says in those cases, that his opinion was, that the Chancellor, in bankruptcy, had not power to

(a) 1 Atk. 87.

(b) 10 Ves. 381.

make such an order as the Court of Review has made in this case. In *Ex parte Rowton* (a), his impression was, that he ought to dismiss the petition, for want of jurisdiction; and though he ultimately made the order, yet it was on the ground of the submission of the parties. And when the same point came before him again in *Ex parte Pease* (b), it is very clear, from the care which he took to found his judgment on special circumstances, that he did not consider that he had such a jurisdiction in bankruptcy as is now contended for. In accordance with the principles thus established, Lord *Eldon* decided, in *Ex parte Wackerbath* (c), that the estate of a deceased assignee could not be charged by an order in bankruptcy; and the Vice-Chancellor also, in *Ex parte Crowe* (d), refused to direct an account against the personal representative of a deceased assignee. The Court of Review has likewise, in one case, acted on this principle; for where a stranger to the commission obtained an assignment of a creditor's proof, and therewith bought part of the bankrupt's estate from the assignees, that Court decided that it had no jurisdiction to set aside the purchase; *Ex parte Holder* (e).

The first order in bankruptcy, that was ever made for the specific performance of a contract by a purchaser, was made by Sir *John Leach*, in *Ex parte Gould* (f), upon the petition of a mortgagee; the sale having been made under Lord *Loughborough's* order. It must be remembered, however, that that case was an *ex parte* application; and that the Court made the order for payment of the purchase money, without directing any in-

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(a) 17 Ves. 426; 1 Rose, 15.

(b) 19 Ves. 25; 1 Rose, 232.

(c) 1 G. & J. 156.

(d) Mont. & M. 281.

(e) 1 Mont. & A. 518.

(f) 1 G. & J. 231.

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quiry as to the title; which is contrary to the practice of the Court of Chancery. The order in *Ex parte Gould* has led to such a series of errors, that we might say of it, as was said of another decision, "It ought to have been forgotten the instant it was pronounced." For how could it have been carried into effect, under the jurisdiction in bankruptcy. The Lord Chancellor had no power, with all the machinery of his Court, and the assistance of all his Masters, to get in a term of years, by any process but by bill and answer. Has the Court of Review superior jurisdiction? The case of *Ex parte Partington* (a) was referred to in *Ex parte Gould*, where it appears Lord *Manners* thought that the biddings, upon sales of a bankrupt's property before Commissioners of Bankrupt, might be opened, as in the case of a sale under a decree in a Court of Equity. But with respect to that case, Sir *Edward Sugden* remarks, "This never has been done, nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place" (b). The only other case, which can be mentioned in support of the present order, is *Ex parte Barrington* (c), which was an appeal to the Lords Commissioners from the decision of the Court of Review in *Ex parte Sidebotham* (d), when the decision of the Court of Review was confirmed, on the authority of *Ex parte Gould*. But that case is no authority for the present order; for there the party had waived all objection to the title, while here the purchaser has objected to it *ab initio*.

Sir *John Cross* supports his judgment in *Ex parte*

(a) 1 Ball & B. 209.

(b) Sugd. Vend. & P. 59, 8th edition. But see *Ex parte Hutchinson*, 2 Mont. & A. 727.

(c) 4 Deac. & C. 461.

(d) 3 Deac. & C. 818.

Sidebotham, by referring to some observations of Lord *Eldon* in *Ex parte Bradley* (a), where his lordship said, "I am convinced that it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use in bankruptcy the authority used in cases in Chancery, where no specific authority is given by the statute. In this Lord *Hardwicke* supports me." But, upon reference to the case alluded to by the learned Judge, it is plain that he mistook the purport of Lord *Eldon*'s observations. It appears evident from the context, that Lord *Eldon* meant to say, not that he could make in bankruptcy such orders as he could pronounce in Chancery; but that he had the same power of compelling obedience to such orders, as were properly made in bankruptcy; an opinion, which he had long before acted upon in *Ex parte Lund* (b). And in the *Anonymous* case, reported in 14 Vesey (c), Lord *Eldon* said, that it was frequently necessary for the Chancellor, sitting in bankruptcy, to call in aid his general jurisdiction. But how can that, and the observations made by Lord *Eldon* in the cases relating to short bills, be made consistent with such an opinion as Sir *John Cross* attributes to him in *Ex parte Bradley*? The case of *Ex parte Green* (d) may be cited by the other side; but the order made in that case depends upon peculiar circumstances, and is not an authority which can be applied to this. These are all the authorities which can be cited in support of the jurisdiction, and which, if they were even much stronger, would not sanction the exercise of the jurisdiction claimed in the present case. Suppose the Lord Chancellor should be

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(a) 1 Rose, 203.

(b) 6 Ves. 782.

(c) *Anonymous*, 14 Ves. 449.

(d) 1 Atk. 202.

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made a Commissioner for any purpose under an act of parliament, would the mere fact of his being at the head of a Court of Equity confer upon him any authority beyond that so given by statute? Before the case of *Ex parte Gould*, such an order was never heard or thought of. There must have been precedents, if such a jurisdiction existed by petition in bankruptcy; for it cannot be supposed, that the remedy by petition, instead of by bill in equity, would have been neglected, if that course was consistent with the law. Lord *Loughborough* is known to have been favorable to a practice, which had the effect of saving time and expense in suits for specific performance; but he never sanctioned the substitution of a petition in bankruptcy for a bill in equity. It was contended, however, in the Court of Review, that Lord *Loughborough's* General Order of 8th March, 1794(a), proves that the Court of Review has jurisdiction in this case; but that is clearly a fallacy. Soon after that order, an attempt was made to extend the jurisdiction of the Chancellor in bankruptcy, by obtaining an order against a second mortgagee, who would not concur in a sale; but Lord *Loughborough* decided, in *Ex parte Jackson* (b), contrary to his first impression, that he had no authority over the second mortgagee. The order of Lord *Loughborough* is confined to cases of submission by the mortgagee; and the case of *Ex parte Poole* (c) proves that the Court cannot order a sale against an unwilling mortgagee, claiming nothing under the commission, but resting on his security. If an order for sale, therefore, cannot be made against an individual who does not claim under the commission,

(a) See 2 Deac. B. L. 89.

(c) 1 Ves. jun. 160.

(b) 5 Ves. 357.

how can a general direction have effect against all the subjects of the realm who may become purchasers, and who are strangers to the fiat?

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3dly. We also contend, that the order of the Court of Review is not supported by the submission of the party. On this head, it has been urged by the other side, that the purchaser, by entering into the contract of purchase, has submitted to the jurisdiction of the Court. But if, according to the constitution of the Court, it has not jurisdiction over the subject-matter, the submission of the purchaser, which is only to the Court as far as it has power, cannot enable it to adjudicate upon the matter in dispute, when that matter is not within its cognizance.

It was also insisted by the respondents before the Court of Review, that the sale being made by order of that Court, the Court would enforce the performance of the contract, as the Court of Chancery would a sale under a decree. But the power to decree the specific performance of a contract is one of the strongest instances of the power of a Court of Equity, and is subject to many principles and rules, which can have effect only in such a Court. Such a power was never acquired by the Lord Chancellor sitting in bankruptcy. The luminous judgment of Lord *Eldon*, in *Jenkins v. Hiles* (a), wherein he defines the law and practice of Courts of Equity with respect to specific performance, plainly shows how unfit the Court of Review would be for the exercise of such a power. In the instance of a sale under a decree of the Court of Chancery, the transaction takes place before the Master, who reports the result of the sale to the Court, and the contract of sale is not complete until the Master's report is confirmed; after which

(a) 6 Ves. 646.

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the Court will enforce the sale, even against the purchaser's representatives. The sale is considered as a judicial transaction, and is not within the Statute of Frauds; *Attorney-General v. Day* (a). But in the present case, the agreement was made between the parties, without reference to the Court. It was clearly subject to the Statute of Frauds, and could not have been enforced by the Court of Review against the purchaser's representatives. Upon this part of the case, it is important to bear in mind the limited right of appeal (given by the statute (b)) from a judgment of the Court of Review, which is confined to matters of law and equity, and evidence only. Every question of fact, therefore, that can arise upon the title to property, may, if this order be valid, be determined by the Court of Review, without any power of appeal either to the Lord Chancellor, or even to the House of Lords (c); and thus a decision may be obtained in the Court of Review, conflicting with the judgment of the highest tribunal in the land. What Lord *Thurlow* says, in *Ex parte Comings* (d), is fatal to the jurisdiction claimed by that Court: "A sale under an order in bankruptcy, at the instance of a mortgagee, is not like a sale before the Master in the Court of Chancery."

Besides the objections already urged, we submit that the Order of the Court of Review is bad, for other reasons. By that order it is referred to the Deputy Registrar, to ascertain whether the petitioners could make out a good title to the manor in question. Now, although Sir *George Rose* said, in *Ex parte Sidebotham* (e),

(a) 1 Ves. sen. 127.

(d) 1 Ves. jun. 112.

(b) 1 & 2 Will. 4. c. 56. s. 3.

(e) 3 Deac. & C. 818.

(c) 1 & 2 Will. 4. c. 56. s. 37.

that the Registrars of the Court, being barristers, are perfectly competent to the task, yet we submit, that the Registrars were not appointed for the exercise of such a duty, as the Court has cast upon one of those officers in the present instance. The duty of the Registrars of the Court is to take notes of its proceedings, and draw up its orders; and the suitor, the bar, and the public, have a right to complain of important and difficult questions of law being referred to a person, of whom, as he had no reason to expect that such duties would be imposed upon him, it is no reproach to say, that he is not prepared for the performance of them. Another objection is, that the question of compensation is referred to the same officer. But that question, if the Court had any jurisdiction in the matter, should not have been delegated to its officer, but should have been decided by the Judges themselves; the amount of compensation might be a subject of calculation or inquiry by the Registrar, but the right ought, certainly, to be declared by the judgment of the Court.

In justice to the purchaser, it should be stated, that he has no wish to evade the performance of the agreement on his part; but that he brings this appeal, in the full conviction that the Court of Review is not empowered to decide upon the matters in dispute.

Mr. *Wigram*, and Mr. *Evans*, for the respondents. The question in this case is a dry point of jurisdiction. The respondents do not claim for the Court of Review a general power to enforce specific performance in all cases of contract; but all that they ask is to declare, that plain and simple cases may exist, in which that Court may exercise such a jurisdiction. By the terms of the special

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case, this must be considered as a case in which there exists no difficulty as to title. [*Lord Chancellor*. The affidavit accompanying the special case states a long correspondence leading to no satisfactory conclusion, but which proves that there must be some question as to title.] It is submitted, that it only proves that the purchaser is dissatisfied, which he may be, without any reason. When points of difficulty formerly arose on petitions in bankruptcy, it is admitted, that the Lord Chancellor would occasionally order them to be brought before the Court in the shape of a bill; and there is no reason why the Court of Review should not order a bill to be filed in any like matter of difficulty, if they deemed it expedient; for it is clear, that that Court has power to order assignees to file a bill. This proves the correctness of the present order of reference, to ascertain whether a good title could be made to the estate in question; as the Court would not blindly order a bill to be filed for specific performance, without previously taking steps to ascertain whether it was probable the assignees could make out a good title. When the inquiry as to the title has been effected, the Court will then decide what steps ought to be taken. To hold that the Court of Review has not jurisdiction in so simple a case as the present, would be to nullify the provisions of the 1 & 2 Will. 4. c. 56. s. 2., which gives that Court the same jurisdiction in bankruptcy in all such matters as were usually brought by petition, or otherwise, before the Lord Chancellor. The purchaser in this case cannot be considered a stranger to the fiat, having brought himself within the jurisdiction of the Court, by bidding for an estate sold under the order of the Court; for the General Order of Lord *Loughborough*, under which the

estate in question was sold, must be construed as a particular order in every case which is subject to its provisions. Suppose the purchaser had gone further than bidding for the estate, and had actually taken possession of it, and exercised acts of ownership, but refused to complete his purchase, or pay the purchase money,—would he not in that case have been liable to the jurisdiction of the Court of Review?

But the competency of the Court of Review to make the order in question, cannot now be controverted, after the decisions in *Ex parte Gould (a)*, and *Ex parte Barrington (b)*. In the former of these cases, so little doubt had Sir John Leach of the propriety of his order on the purchaser of an estate (sold under the order of the Commissioners) to complete the purchase, that he made no observations on the point, and did not even require that the purchaser should appear. The authority of that case has never been questioned, but, on the contrary, has been expressly recognized by the Lords Commissioners of the Great Seal in *Ex parte Barrington*. And there are no special facts in the present case, to take it out of the authority of these two decisions.

It has been said on the other side, that consent cannot give jurisdiction; but the contrary is clearly the law; as appears from the case of the *Attorney-General v. Lord Hotham (c)*, and *Ex parte Bennett (d)*. The purchaser must have known, from the particulars of sale, that he was, by the very act of purchase, subjecting himself to the jurisdiction of the Court of Review. These particulars are in the common form used in sales under a bankruptcy, and are universally understood. [*Lord*

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(a) 1 G. & J. 231.

(b) 4 Deac. & C. 461.

(c) 3 Russ. 415.

(d) 10 Ves. 381.

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Chancellor. I have looked through the contract, as well as the conditions of sale, and find nothing there to distinguish this from an ordinary sale by auction. The particulars of sale would never lead a purchaser to suppose, that he was entering into a contract which could be enforced by the Court of Review. It does not appear, that there is such a settled practice on this subject, as that all the world must know it. If there were, it would go a great way to support the argument of the respondents.] Suppose the purchaser in this case had written to the assignee, accepting the title, upon which the property had been given up to him, and he had committed waste; then suppose a petition to the Court of Review, stating these facts, and praying that the purchaser might be ordered to perform his contract, would the purchaser be allowed both to refuse to pay the purchase money and give up the estate, and compel the assignees to resort to the tedious and expensive course of filing a bill in equity, and thus by taking advantage of the delay incident to proceedings in Chancery, put a total stop to the administration of so much of the bankrupt's estate? This would defeat the entire object of the 1 & 2 Will. 4. c. 56., which, as the preamble of the act declares, is to provide for the distribution of the estates of bankrupts with as little expense, delay, and uncertainty as possible. It has always been held, that the Court, sitting in bankruptcy, has the power of an equitable tribunal. Thus in *Ex parte Bradley*(a), Lord *Eldon* says, "The Court in bankruptcy has the same powers, as in equity;" and the statute just referred to expressly constitutes the Court of Review a Court of Equity. *Ex parte Comings*(b) does not apply to the present case; for all that Lord *Thurlow* there decided

(a) 1 Rose, 203.

(b) 1 Ves. jun. 112.

was, that he would not give any special directions for the sale of an estate, but left it to the Commissioners. The Court of Review stands upon the same footing with the Court of Chancery. The sole reason why the Court of Chancery cannot compel specific performance on petition is, because the writ of subpoena is the only mode by which the Court can bring the party before it; a process not recognized in proceedings in bankruptcy. But here the question is, not as to the particular form of process, but whether the purchaser has not brought himself within the jurisdiction. The greatest weight is due to the authority of *Ex parte Barrington* (a), where all these points were argued and decided by the Lords Commissioners.

As to the power of the Court of Review, in this case, to direct a reference to its officer to award compensation to the purchaser, there can be no question; for the terms of the order are "regard being had to the conditions of sale;" and the amount of the compensation would of course depend on those conditions.

It has been urged, that the Court of Review has no proper officers who are competent to inquire and report as to the sufficiency, or insufficiency, of a title to the property in question; but the Registrars of the Court are barristers; and why should not they be as competent to examine into the title to an estate, as the Masters in Chancery, who call to their assistance the aid of a conveyancer in every inquiry of this kind? It would be most inconvenient, in the administration of the estates of bankrupts, to hold that the Court of Review had no jurisdiction to make this order.

(a) 4 Deac. 461.

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Sir *Charles Wetherell*, in reply. Whatever may be the inconvenience of enforcing the specific performance of a contract by bill in equity, instead of by petition in bankruptcy, it is somewhat remarkable, that this *argumentum ab inconvenienti* should never have been urged for the three centuries, during which the bankrupt law has been in operation. But even admitting it to be more convenient to proceed by petition in bankruptcy, convenience cannot sanction an unauthorised and usurped jurisdiction. The purchaser, in this case, has never submitted to the jurisdiction of the Court of Review; and in the late case of *Latour v. Halcombe* (a), the Vice-Chancellor expressly puts the question, "What original jurisdiction has the Court of Bankruptcy to interfere with a person, who has never submitted to the jurisdiction?"

LORD COTTENHAM, C.—It is impossible to deny, that this question was considered and decided by the Lords Commissioners in *Ex parte Barrington* (b), which authority has been acted upon, as it naturally would be, on the present occasion by the Court of Review. Under these circumstances, I shall look carefully into the case. I have, indeed, a very strong impression at this moment; but I wish to make myself perfectly sure that my impression is correct.

LORD COTTENHAM, C., now delivered judgment. His Lordship, after stating the facts in the special case, proceeded as follows:—

The question is, whether the order of the Court of Review should be supported. That I might form a correct judgment upon this subject, I have considered it in two points of view.

(a) 8 Sim. 76.

(b) 4 Deac. & C. 461.

First: Has the Court of Review jurisdiction, in the abstract, to make the order?

Secondly: Supposing the Court of Review not to have the jurisdiction in general, has the purchaser submitted to the jurisdiction?

It appears to me expedient, first, to consider the question, whether the purchaser has submitted to the authority of the Court? The question then is, whether, assuming that the Court of Review had not jurisdiction, any thing has occurred to estop the purchaser from objecting to it? The reasons, upon which the affirmative has been assumed, unless any have escaped me, are, that as this sale was made by the order of the Court of Review, it is similar to an order of the Court of Chancery, as exercised by means of a reference to the Master; and that by the advertisements it appears, that the sale was by the order of the Court of Review, and, therefore, that the purchaser has submitted to the jurisdiction. I have carefully read the advertisements, the conditions of sale, and the memorandum of agreement for the purchase; but there is nothing in them which would lead to any such inference, as that the purchaser was to submit to be bound by any order of the Court of Review. It is true, that the conditions state, that the sale took place "by order of the Court of Review;" but those words, or similar words, used with reference to any other Court, do not prove that the Court itself is selling. Where Courts of Equity order trustees or executors to sell land, although the sale takes place in obedience to the decree of the Court, yet it is not the Court which sells, but the trustees, or executors. I cannot, therefore, find any thing from which it can safely be inferred, that the purchaser has submitted to the jurisdiction of the Court of Review, or that he was informed he was purchasing

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under any other than the usual terms, or bringing himself under any other than the usual jurisdiction. Such is my clear opinion; and it is obvious, not only that no such inference can be deduced, but that even if the purchaser had so suspected, the conditions of sale would tend to remove such impression; as they contain terms at variance with every thing which would exist under a sale by the Court. The third condition is, that the purchaser is to sign an agreement for payment of the purchase money "to the vendors," on the 18th October then next, "at the office of Messrs. *Burgoyne and Thrupp*, Oxford Street, the solicitors to the assignees, at which time and place the purchase is to be completed;" and that in case the purchase should not be completed on the 18th October, "the purchaser should pay interest to the vendors, unless the vendors should think fit to annul the sale, on account of the nonpayment of the purchase money;" and by the last condition it was stipulated, that any mistake, &c. should not vitiate or annul the contract, but a compensation or equivalent should be given or taken, to be settled by "two referees or their umpire." Now, in judicial sales before the Master, the purchase is completed before him; not at the chambers of the solicitors; and the Court alone, and not the vendors, can annul the sale, or decree interest to be charged; and in case of errors or misdescription, the Master, under the direction of the Court, makes an allowance, and not the vendor.

The consequence of these circumstances is, that even if I thought the Court of Review had jurisdiction, by analogy to the jurisdiction of this Court, still I should say such analogous jurisdiction could be exercised, only, by borrowing the forms used on such occasions by this Court; which has not been done. On sales before the

Master, there is no binding contract, till the Master's report is confirmed; here the parties were bound by signing the agreement of sale. In Chancery, the proceeding is not concluded till the Master's report is confirmed; which is proved by the fact, that till then the biddings may be opened, on a proper case made; in the present case, the agreement was conclusive. Sales before the Master are not within the Statute of Frauds, which is not the case under such sale as the present. In *Ex parte Comings(a)*, there is the strong judicial opinion of Lord *Thurlow* on the subject; he says, "the Court does not give directions about the mode of selling the estate, but leaves that to the Commissioners, who will sell in the manner they think most advantageous. It is not like the sale of an estate before the Master." This is at direct variance with the argument in this case.

I will now proceed to the consideration of the abstract question, whether the Court of Review had jurisdiction to make the order in question. That "the Court of Review has jurisdiction to enforce specific performance," is an expression which has been much used; but the orders of Courts of Equity, enforcing purchases made under decrees, are in no respect decrees for sepecific performance, though it be true that they are subject to the same rules. I might stop here. If the Court of Review can exercise such jurisdiction, the fact, that a purchaser is to come thereunder, should in some way be clearly intimated to him; but, in the present case, no man, not any lawyer in this Court, who bid for this estate, would have imagined otherwise than that he was entering into a private contract of purchase with the assignees.

The acts of parliament relating to the Court of Review

(a) 1 Ves. jun. 112.

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do not confer the jurisdiction assumed. Those acts give power to administer justice between parties under, or coming under, the bankruptcy; and not over strangers. When I use the words "jurisdiction assumed," I do not intend to be understood as conveying an idea, that the Court of Review has improperly "assumed" any thing; that Court was of course bound by the decision of the Lords Commissioners in *Ex parte Barrington(a)*.

I will now shortly advert to the cases cited in support of the order of the Court of Review; first observing, that, prior to those cases, the Court sitting in bankruptcy has always repudiated jurisdiction over strangers. In *Ex parte Poole(b)*, it was decided, that there was no power, on petition in bankruptcy, to order a mortgagee of the bankrupt's estate to deliver up the title deeds. There is not any jurisdiction in bankruptcy over a second mortgagee, who does not come in under the commission; *Ex parte Jackson(c)*. In *Ex parte Rowton(d)* Lord Eldon had jurisdiction from the circumstances of the case; his Lordship observed, "any thing that is necessary for me collaterally to decide, in order to the question of proof, will give me jurisdiction; and as far as the assignees are concerned, they are, under the statutes, already amenable." In *Ex parte Pease(e)*, Lord Eldon said, "I do not disturb what is well settled,—that an assignee under a commission of bankruptcy cannot come here, and call, by petition, on a person to appear here, who claims nothing under the bankruptcy." In *Ex parte Crowe(f)*, it was held, that the Court, sitting in bankruptcy, had no jurisdiction to order the personal representative of a deceased assignee to account for the per-

(a) 4 Deac. & C. 461.

(b) 1 Ves. jun. 160.

(c) 5 Ves. 357.

(d) 17 Ves. 426.

(e) 19 Ves. 25.

(f) Mont. & M. 281.

sonal estate of the bankrupt in his hands. Such is the general doctrine, which cannot be disputed; but cases exist, which come nearer the particular point in this case; thus, in *Ex parte Bennett(a)*, the parties were willing to submit; but Lord *Eldon* said, "The question upon this petition is, whether the sale ought to be declared void. It is clear, that, not being a purchase by a person whose conduct under the commission falls to be controlled in bankruptcy, the proceeding ought to be by bill. The parties suggest, that they are willing to be bound by the judgment in bankruptcy; but I doubt whether I ought to accept that offer, the case involving considerations of great nicety and importance." That was a most important point. General *Harris* was actually anxious to be considered amenable to the jurisdiction in bankruptcy; and even if he had not been so, yet as he had purchased by an agent, clearly under the jurisdiction in bankruptcy, he might have been considered as having brought himself under the jurisdiction; and thus the Lord Chancellor would have been justified in, what Lord *Eldon* has denominated, "putting out a long arm," to bring General *Harris* within that jurisdiction; but, even in that case, Lord *Eldon* thought he could not act, unless the matter came before him by bill in equity.

In *Ex parte Holder(b)*, the Court of Review most properly held, that there was no jurisdiction to set aside a purchase made by a stranger to the commission, who obtained an assignment of creditors' proofs, and there-with purchased part of the bankrupt's estates from the assignees.

With these authorities, it is a little surprising how the case should come before me; but the source of this mischief may be traced. It has arisen from two cases;

(a) 10 Ves. 381.

(b) 1 Mont. & A. 518.

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perhaps from one only, but certainly from but two, at most. The first is, *Ex parte Partington* (a), which case,—as the Lord Chancellor made no order, but refused the application on other grounds,—goes for nothing as an authority.

The second case is *Ex parte Gould* (b), where an order was made, upon a petition in bankruptcy, that the purchaser of the bankrupt's estate,—which had been legally mortgaged, and sold under the order of the Commissioners, acting under Lord *Loughborough's* General Order,—should complete his purchase. That case was decided by Sir John *Leach*; and if it had been argued, or if his attention had been drawn to the point, it would be entitled to receive the greatest attention, as are all the decisions of that eminent man; but the purchaser did not appear, and the question was not raised before him. I am not inclined to allow weight to that case, or to any other judgment in which the attention of the Court is not directed to the point, which the decision is dependent upon as establishing.

But *Ex parte Gould* was unfortunately relied upon as a precedent in *Ex parte Sidebotham* (c). In those cases jurisdiction was assumed, because the sale took place in pursuance of an order of the Court; but neither in *Ex parte Gould*, nor in *Ex parte Sidebotham*, was there a particular order; there was, in fact, no order at all for a sale by the Court; for Lord *Loughborough's* General Order of March 8, 1794, is merely directory. The judgment of the Lords Commissioners, in *Ex parte Barrington* (d), was founded exclusively upon *Ex parte Gould*. Sir *Lancelot Shadwell* says, "There being no reversal of *Ex parte Gould*, and no appeal from it,

(a) 1 Ball & B. 209.

(c) 3 Deac. & C. 818.

(b) 1 G. & J. 231.

(d) 4 Deac. & C. 461.

though that was the only authority for the order,—still, as Lord *Eldon* has said, the authority of even a single case, if not appealed from, ought not to be disturbed upon slight grounds,—we are of opinion, that there is no reason to reverse the order of the Court of Review.” When Sir *Lancelot Shadwell* said this, he could not have had in view the fact, that *Ex parte Gould* was decided *ex parte*; and the rule he refers to cannot be applied to cases so decided; unless, indeed, when followed up by a long course of practice. It appears, then, from a review of the cases, that there is no foundation for the assumption of jurisdiction, with the exception of *Ex parte Gould*.

When I find this jurisdiction totally unknown in bankruptcy before *Ex parte Gould*, I ask myself, whether a sufficient time has elapsed since that case was decided, to establish, on that ground, a practice with which it would be improper to interfere? If so, I should be unwilling to reverse this order; but as I find no authority but *Ex parte Gould*, which is unsupported in any way, which is an *ex parte* case, and contrary to all preceding *dicta* and judgments, I think I may treat it as not binding. If ever such a jurisdiction could have been safely exercised, it was formerly, when bankruptcy cases were heard before the Lord Chancellor, who might take advantage of all the machinery of the Court of Chancery; but, nevertheless, it was repudiated, because the Chancellor, sitting in bankruptcy, had it not. It must also be taken into consideration, that if the Court of Review makes such orders, it must carry them out, and must assume power, not only to enforce contracts, but also to rescind them, and to decree compensation, &c., which it is not pretended that Court can do. In *Latour v. Hal-*

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combe(a), the assignees sold part of the bankrupt's estate, while he was taking steps to supersede his commission; and he filed a bill against them and the purchaser, to rescind the contract; but the Vice-Chancellor very properly held, that the Court could not order a person, who had not come in under the commission, to give up and reconvey the estate; and his Honor said, "What original jurisdiction has the Court of Bankruptcy to interfere with a person, who has never submitted to the commission?" So that jurisdiction to rescind a contract is here expressly repudiated, and that, too, by the same Judge, who decided in *Ex parte Barrington* that there was power to enforce a contract. It would be a hard case for the purchaser, if he were bound to obey the order of the Court of Review directing him to fulfil the contract, and yet could not be discharged by that Court from an improper contract.

Another difficulty is, that if a Court decrees a sale, it must have before it all persons, whose acts are necessary to give a good title; which would be the case in this Court, but it might not be so in the Court of Review. It was part of the argument of the respondents, that this jurisdiction might be very wholesomely exercised in simple cases; but there cannot exist jurisdiction for simple cases, and not for complicated cases; supposing this possible, it would follow, that the Court of Review must decide that the case was simple and easy, and thus the question of jurisdiction would follow, instead of preceding, the merits. Some of the circumstances, to which I have adverted, would not alone support my judgment in this case; I nevertheless go into them, on account of the importance of the question. My judgment is founded upon the want of jurisdiction, and upon the fact, that

Ex parte Gould is not sufficient authority, upon which to found jurisdiction. It is said, that sales under orders of this Court produce less than they would, if otherwise sold; which would apply more strongly to sales under a bankruptcy, if the order in this case were correct; which would be most injurious for all parties.

The Order of the Court of Review must be discharged. I give no costs on either side.

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Ex parte CHAPMAN.—In the matter of CLARKE.

THIS was the petition of a creditor, to increase a proof. It appeared, that a debt of 556*l.* was sworn by the petitioner, in his deposition before the Commissioner, to be due to him from the bankrupt, for money advanced for his use; but Mr. Commissioner *Evans* would only admit the proof to be made for 348*l.*, on the ground that there was no evidence by third persons, or collaterally, of the advances made by the petitioner. The whole debt, however, was admitted by the bankrupt, and not disputed by the assignees.

Westminster,
April 27, 1838.

A Commissioner is not justified in rejecting the proof of a debt,—which is admitted by the bankrupt, and not opposed by the assignees,—because the deposition of the creditor is not supported by the evidence of third persons.

Mr. *Bethell*, in support of the petition. When the petitioner attended before the Commissioner, he referred to a paper, which is now offered to the inspection of the Court, containing memoranda of the different sums lent by him to the bankrupt; which memoranda were made by the petitioner at the respective times the money was lent, and were admitted by the bankrupt to be correct. The identical evidence now offered to the Court was tendered to the Commissioner.

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Mr. *Swanston*, who appeared for the assignees, admitted that the only ground of the rejection of the proof by the Commissioner, was, that the deposition of the creditor was not supported by the evidence of third persons. He left the matter entirely to the discretion of the Court.

Sir GEORGE ROSE.—If there was any suspicion attaching to the transaction, the Commissioner was right. But if there was no suspicion, what becomes of the act of parliament?

ERSKINE, C. J.—There is here no affidavit of the bankrupt denying the debt, or casting any suspicion on the transaction. It appears from the petition, and affidavit in support of it, that part of the money was advanced to the bankrupt by the petitioner, through other persons; and that this part of the debt was supported by their evidence; but when the petitioner advanced the money himself, he was the only person who could prove the facts. If there had been any suspicion as to the validity of the debt, the Commissioner could, of course, have delayed the proof, until some inquiry could be made into the consideration for the debt. But if the Commissioner could thus reject the deposition of a creditor, because it was not supported by the evidence of third persons, he would be dispensing with the act of parliament, which allows a proof to be made upon the oath of the creditor himself.

Sir JOHN CROSS.—I perfectly agree with his Honor the Chief Judge. When the deposition of a creditor is uncontradicted and undisputed, I think the Commissioner is bound to admit the proof, without any additional evidence.

Sir GEORGE ROSE.—I have no hesitation in saying, that where there is no contradiction to the statement of a party applying to prove a debt, as contained in his deposition, and no suspicion attaches as to the *bonâ fide* contracting of the debt, the evidence of the creditor himself ought to be admitted as sufficient proof of the debt.

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ORDERED as prayed: Petitioner to have his costs out of the estate.

Ex parte SANDALL.—In the matter of CLARKE.

THIS was the petition of a creditor to annul the fiat, on the ground of there being no good petitioning creditor's debt, nor any act of bankruptcy. The petitioner stated that he was a creditor of the bankrupt, when the fiat issued, to the amount of 150*l*. The fiat issued so far back as January 1835.

Westminster,
April 27, 1838.

A petition by a creditor, to annul the fiat, must state not only that he was a creditor when the fiat issued, but that he is still a creditor. And where a creditor delayed three years before he made the application, the Court would grant no indulgence to such an informality.

Mr. *Swanston*, in support of the petition.

Mr. *J. Russell*, *contrâ*. The fiat having issued so long ago, and the petitioner having assigned no reason for his delay in not applying to the Court before the lapse of three years, the Court will not now entertain this petition. Then, the petitioner merely states, that the bankrupt was indebted to him in the amount of 150*l*., at the time of the bankruptcy, without adding that he *still* is indebted. And it was decided by this Court in *Ex parte Flight* (a), that a creditor, petitioning to super-

(a) 1 Deac. & C. 78.

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sede, must not only state that he was a creditor at the time of suing out the fiat, but also at the time of presenting his petition. The assignee has made an affidavit in answer to the petition, in which he states his belief, that the present petition has been got up by the contrivance of the bankrupt.

ERSKINE, C. J.—As the petition does not state that the petitioner is now a creditor, *non constat*, but that the debt has been paid. If this, however, had been an application made immediately after the issuing of the fiat, the Court would have been disposed to have allowed an inquiry as to the existence of the petitioner's debt. But when a delay of three years is suffered to occur, before the petitioner makes any application whatever to supersede, the Court will not interfere upon the petition of a party, who has not already shown that he is still a creditor.

Sir JOHN CROSS.—The petition merely alleges, that the petitioner *was* a creditor for 150*l.*, without stating for what consideration the debt was incurred. Suppose he had been a bill-holder at the date of the fiat, and the bill had since been paid. This would have been quite consistent with the terms of the allegation in the petition.

Sir GEORGE ROSE.—It is impossible to supersede a fiat, on the statement in this petition. And it is now too late a stage, to allow any favour asked by a person, who comes with such an informal case. The petitioner has *no locus standi*.

Petition dismissed, with costs.

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Ex parte JAMES WATSON.—In the matter of JOHN WATSON and JAMES WATSON.

Westminster.
April 24, 1838.

THIS was a petition by the bankrupt, *James Watson*, to annul the fiat, on the ground that he was an infant at the time of the bankruptcy. A joint fiat had issued against both the bankrupts as partners, under which they had both surrendered.

Semble, that a joint fiat may be annulled as to one of the bankrupts, on the ground of infancy, and stand good as to the other; under the 6 Geo. 4. c. 16. s. 16.

Mr. *Montagu*, in support of the petition, said, that the infancy was not disputed, and that the petitioner had never held himself out to the world as an adult; which distinguished this case from that of *Ex parte Watson (a)*, where the Court refused to supersede a commission for this cause, on the petition of the bankrupt, but left him to his action at law.

Mr. *Bethell*, for the assignees, did not oppose the annulling of the fiat, as to *James Watson*; but submitted it might stand good as to *John Watson*, under the 6 Geo. 4. c. 16. s. 16., which provides, that in every commission against two or more persons, it shall be lawful to supersede such commission as to one or more of such persons; and the validity of such commission shall not be thereby affected as to any person, as to whom such commission is not ordered to be superseded.

Mr. *Montagu* suggested a doubt, whether the fiat would be good against *John Watson*, if it was annulled as to *James Watson*; as the 6 Geo. 4. c. 16. s. 16. did

(a) 16 Ves. 265.

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not intend to render valid a fiat, which was originally invalid (a).

The COURT said, that the Order might be, either that distinct accounts should be taken, and the fiat annulled, as to the petitioner *James Watson*; or, that it might be annulled generally, and the petitioning creditor be at liberty to take out a new fiat against *John Watson*, with costs of all parties out of the joint estate.

Mr. *Bethell*, on a subsequent day, stated, that it was agreed to take the latter Order for annulling the fiat altogether; the petitioner agreeing to confirm all sales.

(a) But see *Ex parte Bygrave*, 2 G. & J. 391; *Re Coleman*, Mont. & M. 15.

Ex parte JOHN HALLOWELL.—In the matter of WILLIAM BELL.

Westminster,
April 28, 1838.

A. issues a fiat against a trader; upon which B., another creditor, proposes to him to abandon the fiat, and arrange the bankrupt's affairs by a trust deed, for the equal benefit of all the creditors; to which proposal A. assents, and causes the trust deed to be prepared, and tendered to B. for his signature. B. discovers that the deed gave A. an undue preference over the other creditors, and issues a second fiat.—Held, that he was justified in so doing; and a petition by A. to annul such second fiat was dismissed, with costs.

THIS was a contest between two creditors, as to the fiat. The petition prayed, that the fiat already issued might be annulled, as taken out against good faith.

On the 23d January 1838, the petitioner issued a fiat against *Bell*; a few days after which, a proposal was made by *Peacock*, another creditor, to wind up *Bell's* affairs by an assignment to trustees for the benefit of his creditors, instead of making him a bankrupt. On the 29th January, a meeting of creditors took place to consider of this proposal, when it was unanimously agreed, that it would be inexpedient to proceed in the prosecution of the fiat; and for the satisfaction of the petitioner, *Peacock* signed the following memorandum:

and issues a second fiat.—Held, that he was justified in so doing; and a petition by A. to annul such second fiat was dismissed, with costs.

“ Newcastle, 29th January 1838.

“ I have attended a meeting this evening, for the purpose of having some adjustment come to relating to the affairs of Mr. *Bell*; and I hereby signify my concurrence in an assignment to Messrs. *Hallowell, Davison, & Lowes*, for the equal benefit of the creditors: and I hereby agree to execute such assignment, and unite with the trustees in winding up the affairs under such assignment.

“ *Thomas Peacock.*”

1838.

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The petitioner alleged, that in consequence of this agreement he abandoned the prosecution of the fiat; and on the 30th January, when the Commissioners met to open the fiat, he forebore to bring forward evidence to procure an adjudication, and the Commissioners adjourned the meeting for want of such evidence. On the 1st February a deed of assignment was prepared, whereby *Bell* assigned all his estate and effects to *Hallowell, Davison, & Lowes*, in trust for the equal benefit of his creditors, which was executed by the trustees and nearly all the other creditors; in pursuance of which the trustees had proceeded to collect in the effects. On the 17th March the deed of assignment was tendered to *Peacock* for execution, who said he could not then tell the amount of his debt, but that he would make out his account, and call on the solicitor of the trustees on the following Monday, and execute the deed. The petition then stated, that on the 15th March, without any notice to the petitioner, *Peacock* presented a petition to annul the fiat issued by the petitioner, for want of prosecution, and that a new fiat might issue, upon the petition of *Peacock*. The fiat was annulled accordingly, and a new fiat, dated the 15th March, was issued, on

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the petition of *Peacock*, the affidavit of debt having been made by him on the 13th March. On the 19th March this second fiat was opened, and *Bell* was adjudged a bankrupt, on proof of an act of bankruptcy alleged to have been committed by him one day prior to the date of the trust assignment.

In answer to the allegations in the petition, *Peacock* stated in his affidavit, that when he signed the memorandum of the 29th January he had no intention of issuing a fiat against *Bell*, nor had he any such intention until about five weeks afterwards, when he discovered that the assignment was not for the equal benefit of the creditors; but enabled the trustees to pay a large debt in full to the petitioner, in preference to the rest of the creditors; upon which discovery *Peacock* determined not to execute the assignment; and having also discovered that *Bell* had committed a previous act of bankruptcy, he determined to apply for another fiat.

Mr. *Swanston*, and Mr. *J. Russell*, in support of the petition. *Peacock* has been guilty of a gross breach of faith in issuing the second fiat; for when he was applied to on the 17th March to execute the trust deed, the only excuse he assigned for not then executing it was, that he had not then ascertained the amount of his debt; and he engaged to call on the Monday following and execute it. Now, at this very time he had applied to annul the first fiat, and had issued another one; having presented a petition for that purpose two days previously. This breach of a positive engagement, on the part of *Peacock*, has involved the petitioner in serious liabilities. The case of *Ex parte Lowe* (a) was, in its circumstances, very like the present. In that case Lord *Eldon* says, "The

(a) 1 G. & J. 78.

bankrupt had a commission taken out against him. It afterwards occurred to the great body of the creditors, to think it would be more beneficial, if a trust deed were executed. Accordingly, the property is assigned to the petitioner and another person, for distribution amongst the creditors. Nothing is more clear than this, that where persons think fit to accede to such a trust deed, they cannot afterwards complain of what is done under it—for this reason amongst others, that they have authorised the division of the property under the deed; and if they afterwards take out a commission, they put themselves in the situation of recalling their confidence from those, in whom they expressed that they placed confidence, and of reclaiming what has been paid by the trustees, under the circumstances of that confidence." And his lordship in that case superseded the second commission, which had been taken out by the creditor, in violation of his engagement to accede to a trust deed. On the authority of that case, we contend that it is competent to a petitioning creditor to abandon his fiat, and to adopt a different mode of distributing the bankrupt's effects. [Sir *G. Rose*. I think that case is not applicable to the present.] The conduct of *Peacock* in issuing the second fiat, we charge to be fraudulent; and there is nothing in the practice of bankruptcy, that gives any sanction to fraud. The trustees have, on the faith of the deed of assignment, proceeded to sell the property and collect in the debts of *Bell*; and will incur a serious loss, if this fiat is permitted to stand.

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Mr. *Anderdon*, for *Peacock*, the petitioning creditor. When the Court is in possession of all the facts of this case, it will have no doubt as to the merits. The case

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of *Ex parte Lowe* (a) does not apply to this. There, there was no valid act of bankruptcy; the petitioning creditor, who was a party to the trust deed, setting it up as an act of bankruptcy; besides which, he was guilty of fraud and great delay; and the commission itself was wholly inoperative and void, for he swore that he had no debt. Here there are two creditors, one for 100*l.*, and another for 160*l.*, who have refused to execute the trust deed. Even supposing that *Peacock* had executed the trust deed, yet, according to the decision in *Doe v. Anderson* (b), if he had been ignorant that an act of bankruptcy had been previously committed by *Bell*, he might, notwithstanding, have become a petitioning creditor in respect of his original debt. It is true, that *Peacock* in the first instance assented to a deed of trust; but he discovered afterwards, that there had been a secret assignment by the bankrupt to the petitioner of all the utensils in his brewery, and that the object of the petitioner was to get more under a deed of trust, than he could under a bankruptcy; inasmuch as under a fiat in bankruptcy the utensils, being moveables, would be considered to be in the order and disposition of *Bell* at the time of his bankruptcy, and consequently to be divisible amongst his general creditors. The bankrupt swears, that he believes the petitioner intended to pay himself, in preference to the other creditors.

Mr. *Swanston*, in reply.

ERSKINE, C. J.—If there had been any general proposition in the law of bankruptcy, that a party, who had once assented to a deed of trust, could not afterwards

(a) 1 G. & J. 78.

(b) 5 M. & S. 162.

sue out a fiat against his debtor, then the duty of the Court would be clear, in granting the prayer of this petition; because it appears that *Peacock* induced the petitioner to abandon the first fiat, and assent to a trust deed, which *Peacock* also expressly engaged to execute. But I cannot find any decision laying down any such general rule. The case of *Ex parte Lowe* was decided under very peculiar circumstances. In that case Lord *Eldon* says, "The true question is, whether, if a commission has been taken out in furtherance of a conspiracy to harass an individual, or contrary to that good faith which ought to obtain between debtor and creditor—in other words, if a commission has been taken out, where the party has no right to support it, and where it can be truly represented as matter of oppression, the only remedy is to apply to the Bankrupt Office to supersede; or, whether the party has not a right to come here to complain of such a proceeding, and to be indemnified in the nature of excessive costs, which he may have incurred by the commission being taken out and not proceeded in." Lord *Eldon* adds some general observations, showing how unfair it was that a party who had assented to a deed of trust should afterwards recall his assent, and reclaim the property that had been sold under it and distributed among the creditors. But Lord *Eldon* does not decide the case on that ground, but on others, namely, that the petitioning creditor swore he had no debt, and gave his solemn assurance he would not disturb the trust deed; and the solicitor who took out the commission was a party to the deed. That case therefore affords no foundation for the position contended for in this, that *Peacock* having assented to a deed of trust, that circumstance must necessarily call on this Court to supersede a fiat

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which is afterwards issued by him. It may be put to the discretion of the Court to supersede, under such circumstances, but not as a matter of right in the party who petitions to supersede. The Court would undoubtedly annul a fiat issued by a composition creditor, if a proper case were made out; if, for instance, the bankrupt petitioned to annul, on the ground of oppression and a breach of good faith. But in this case there is no legal principle, on which the Court is called upon to annul the fiat, unless the interests of the creditors required it, which is not the fact. The only question now is, therefore, whether *Peacock* should pay to *Hallowell* the costs of the first fiat. And if the facts had been as stated in the petition, I should have thought that he should pay those costs, even without any charge of bad faith on his part. But when we come to look at all the circumstances disclosed by the affidavits, it seems unjust that the payment of these costs should be imposed on *Peacock*. When *Peacock* signed the memorandum of the 29th January, he agreed to an assignment to trustees for the equal benefit of the creditors; but when he sees the trust deed, he finds this proviso in it—that the trustees, after paying off a prior mortgage on the brewery to a building company for 700*l.*, were to pay off a mortgage on the brewing utensils to *Hallowell* for 200*l.*; and if the proceeds of the brewing utensils were not sufficient for this purpose, then that the trustees were to pay *Hallowell* the amount of any deficiency out of the general proceeds of the bankrupt's estate. Now, this would have been a gross preference of *Hallowell*, to the injury of the other creditors; for the payment should have been confined to the proceeds of the property mortgaged, giving him liberty to come on the general funds, not in preference to,

but rateably with the other creditors. This provision was certainly unfair towards *Peacock* and the other creditors; and when he discovered the fact, I think he was justified in withdrawing from his agreement, and suing out another fiat. The consequence is, that this petition must be dismissed, with costs.

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Sir JOHN CROSS.—I am of the same opinion. In the petition the material fact is suppressed, that *Hallowell*, the petitioner, in respect of his mortgage of the brewing utensils, was to have a fraudulent preference over the other creditors. The bad faith, which has been charged, was not on the part of *Peacock*, but of *Hallowell*. When *Peacock*, therefore, got scent of what was going forward, and that *Hallowell* was endeavouring to pay himself in full, at the expense of the other creditors, he chose to issue a second fiat; and I think he was justified in so doing.

Sir GEORGE ROSE.—It was very plain to me, throughout the whole of the argument, what was to be done with this petition, upon the petitioner's own statement. The material question for us to consider, as very properly put by the Chief Judge, is, which of these two parties is liable for the costs of the first fiat; and I agree with him, that they must fall on *Hallowell*, and that this petition also must be dismissed, with costs. It has been long an established rule in bankruptcy, that the petitioning creditor, who takes out a fiat, is bound to carry it on to the choice of assignees; after which the creditors are at liberty to enter into a compromise with the bankrupt, by assenting to a trust deed, in the manner pointed out by

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the 6 *Geo.* 4. c. 16. s. 133. But, in this case, the petitioner enters into an arrangement for annulling the first fiat, without even proceeding to adjudication; and he now comes here, and sets up a trust deed, in opposition to a fiat subsequently issued. But, was it ever heard of, that a petitioning creditor was at liberty to abandon his own fiat, and annul that of another creditor, in order to set up a trust deed? I defy any one to produce a case, where a petitioning creditor has been permitted, under such circumstances, to come back to the Court, for the purpose of superseding the second fiat and setting up a trust deed. It has been endeavoured, on the part of the petitioner, to impress on the Court the case of *Ex parte Lowe*, as a decided authority in his favour; but that case has not the most distant application to the one before the Court. In the first place, the petition was in that case not that of the petitioning creditor; there was no petitioning creditor's debt; and the commission had been worked up to the proper period, the choice of assignees. Then, as to the costs. The agreement of *Peacock* with the petitioner was, that the trust deed should be for the equal benefit of the creditors. *Peacock* then says, you concealed the circumstance of your having a security from the bankrupt, that was prejudicial to the interests of the other creditors, and have secretly introduced into the trust deed a clause, which gives you an undue preference over them. *Peacock* therefore had a perfect right to refuse his assent to the trust deed, and take out a second fiat.

Petition dismissed, with costs.

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*Westminster,
May 1 and 7,
1838.*

On a petition for payment of a dividend, the order is of course, unless a cross petition is presented within a reasonable time.

Ex parte LEES.—In the matter of OULTON.

THIS was a petition for payment of a dividend, which stood in the paper of the day.

Mr. *Swanston*, on the part of the respondent, moved that the hearing of the petition might be adjourned till next term, on the ground that a cross petition to expunge the proof had been prepared, and sent down to the country to be signed; and it was desirable that both petitions should come on together.

ERSKINE, C. J.—While the proof stands on the proceedings, and a dividend is declared, it is a matter of course, that the dividend should be paid. Here the present petition was presented on the 12th March, and this is the 1st May; why did you not present a petition to expunge before?

Sir GEORGE ROSE.—Have you any affidavit that the dividends in the petitioner's hands will be endangered, or that if the proof is expunged, they are not likely to be returned? If a petition for payment of dividends, and another to expunge the proof, are in the paper together, the Court would, in that case, hear them both at the same time; but the Court will not adjourn the hearing of a petition for payment of dividends, in order that a petition to expunge the proof may be presented.

Mr. *Anderdon*, *contra*.

The COURT refused the motion, with costs.

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Ex parte

LEES.

May 7.

The petition was this day called on for hearing.

Mr. *Swanston*, and Mr. *Teed*, appeared for the assignees, and stated, that the cross petition was now presented for expunging the proof, on the ground that the debt had been actually paid in full: they therefore moved that it might be brought up and heard, together with the petition for payment of the dividend, or that the costs might depend on the result of the cross petition.

The COURT made an order for the payment of the dividend, but directed the costs to stand over till the hearing of the cross petition to expunge the proof.



Westminster,
May 1, 1838.

It is no objection to the proof on a bill of exchange against the drawer, that the holder obtained it from the acceptor; if there is no suspicion of fraud.

On a petition to prove against the drawer, no evidence is required of his hand-writing, or of the notice of dishonour, where no objection was made on either of these grounds before the Commissioner.

Ex parte GILL.—In the matter of BATES.

THIS was a petition to prove on a bill of exchange for 50*l.*, drawn by the bankrupt on one *Headley*, which he accepted, and which the bankrupt afterwards indorsed to him. The bill was afterwards paid away by *Headley* to the petitioner, in payment for a quantity of cotton sold by the petitioner to *Headley*. *Headley* had become bankrupt as well as *Bates*, the drawer; and the petitioner had already proved the bill under the fiat against *Headley*. He now sought to prove it also under the fiat against *Bates*; but the Commissioner rejected the proof, on the ground that the petitioner got the bill from the wrong hand, namely, the acceptor; and the presumption was, therefore, that it was paid. In answer to this objection, it was stated to have come to the hands of the petitioner, before it was due.

Mr. *White* appeared in support of the petition.

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Mr. *Toller*, *contrâ*, stated that no consideration passed from *Headley* to *Bates*, for the transfer of the bill.

ERSKINE, C. J.—That is immaterial.

Sir JOHN CROSS.—I doubt, whether the hand-writing of the drawer, and notice of the dishonour of the bill, ought not to be now distinctly proved.

ERSKINE, C. J.—The only reason assigned by the Commissioner for rejecting the proof was, that the petitioner obtained the bill from the wrong party; and it appears that no objection was made before him, as to the want of proof of the hand-writing of the drawer, of notice of dishonour, or of the consideration of the bill. These facts must therefore be taken to be admitted. The ground of rejection by the Commissioner appears to me untenable, in the absence of all suspicion of fraud. The petitioner ought to be placed in the same situation, with respect to any dividend under *Bates's* estate, as if he had proved when he tendered his proof. If any dividend, however, has been declared under the fiat against *Headley*, the amount must of course be deducted before proof is made against *Bates*.

Sir JOHN CROSS expressed himself now of the same opinion.

Sir GEORGE ROSE also concurred.

ORDERED as prayed. Costs out of the estate.

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Ex parte CORNELIUS WOODWARD and others.—In the
matter of RICHARD TURNER.

Westminster,
May 23, 1837.

A payment by one of two joint makers of a promissory note, of any interest due on the note, prevents the other joint maker from availing himself of the Statute of Limitations. But see post.

CASE 1.

THIS was a petition of creditors, to expunge the proof of one of the assignees, on the ground that the debt was barred by the Statute of Limitations.

It appeared, that *John Doncaster*, the assignee, had on the 22nd March 1836 proved for the sum of 785*l.* 18*s.*, the amount of which was made up of 400*l.* principal money alleged to be due to him on a promissory note for that amount, bearing date the 11th October 1822, under the hands of the bankrupt and one *William Pindar* and *William Tongue*—and of the further sum of 200*l.* principal money, alleged to have been lent by *Doncaster* to the bankrupt on the 17th June 1825, for which a written memorandum was given by the bankrupt; and the residue of the proof consisted of the sum of 158*l.* 18*s.*, for arrears of interest on the two first-mentioned sums.

The fiat issued on the 22nd February 1836.

The petition alleged, that the Commissioner ought not to have allowed the proof, inasmuch as more than six years had elapsed since the debt arose, and no sum of money had been paid by the bankrupt to *Doncaster*, either in part discharge of the principal or interest, within the period of six years previously to the 22nd March 1836. It was further alleged, that the fact of no interest having been paid on either of the sums of 400*l.* and 200*l.*, within the period of six years, plainly appeared from the particulars of the proof made by *Doncaster*; wherein it was stated, that the sum of 185*l.* 18*s.* was claimed by him for interest for the said two sums of 400*l.* and 200*l.*; whereas the interest on those two sums,

at the rate of 5*l.* per cent. per annum for a period of six years, would only amount to the sum of 180*l.*

In opposition to the petition, *Doncaster* filed an affidavit stating, that, as respected the sum of 200*l.*, the bankrupt, within six years of his bankruptcy, namely, on the 18th February 1834, had paid interest to the 17th June 1833; and that on the 3d November 1835, he and the bankrupt stated an account together, which was in the bankrupt's hand-writing, in which he allowed *Doncaster* 30*l.* for two years and a half interest on the 200*l.*, from the 17th June 1833 to the 17th December 1835; that, as to the promissory note for 400*l.*, *Doncaster*, in December 1835, had received a dividend under an assignment made by *William Pinder* (a joint maker of such note) for the benefit of his creditors; and that on the 22nd November 1832 he had also received a dividend on the said sum of 400*l.*, under an assignment made by *William Tongue* (another joint maker of the note) for the benefit of his creditors; that there had been material dealings and accounts between *Doncaster* and the bankrupt, unsettled at the time of his bankruptcy; that in September 1835, the bankrupt, being in embarrassed circumstances, applied to *Doncaster* to be a trustee under a creditor's deed, and upon that occasion drew out in his own hand-writing a statement of his debts, in which he inserted *Doncaster's* debt as follows:—"Mr. *Doncaster*, including interest, 773*l.*;" and on the 6th October 1835, the bankrupt made a conveyance of his real and personal estate to *Doncaster* and two other trustees, for the benefit of his creditors.

In reply, it was sworn by one *Thomas Bradshaw*, that on the 24th February 1837 he attended meetings of the creditors of *Pinder* and of *Tongue*, and that *Doncaster's*

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solicitor, who was also solicitor to the assignees, under the respective assignments of *Pinder* and *Tongue*, then stated to *Bradshaw*, that no dividend had been paid to *Doncaster* under either of the assignments, and that no dividend would be paid to him, until the petition to expunge the proof had been disposed of; adding, that if *Doncaster* was not entitled to prove against the bankrupt's estate, he was not entitled to prove against the estate of *Pinder*, or *Tongue*. The deponent averred, that he believed, if any dividend had been paid to *Doncaster* under either of the assignments, it must have been since the 24th February 1837, for the purpose of defeating this petition.

Mr. *Temple*, and Mr. *Koe*, in support of the petition, contended against the fact of the payment of interest on the debt.

Mr. *Swanston*, *contra*, on behalf of *Doncaster*.

Mr. *F. Bayley* appeared for the other assignees.

ERSKINE, C. J.—The case is not quite free from suspicion; and it would have had a better appearance, if it had been brought earlier before the Court. The bankrupt has furnished a copy of an account, of which the original has not been produced; but it is positively sworn, that the bankrupt signed the original; and this is substantially a part of the claim for 200*l*. Then, as to the note for 400*l*., it is proved, that there was a payment by one of the joint makers of the note, which takes it out of the statute. There is not sufficient ground for expunging the proof.

Sir JOHN CROSS.—The evidence is not quite satisfactory to my mind; but I cannot come to a different conclusion from that of his Honor the Chief Judge.

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Petition dismissed. The assignees to have their costs out of the estate (*a*).

(*a*) Sir *George Rose* had left the Court before judgment was pronounced.

Ex parte WOODWARD.—In the matter of TURNER.

Lincoln's Inn
Hall,
coram

CASE 2.

Ld. Chancellor,
Dec. 13, 1837.

THIS was a petition of appeal to the Lord Chancellor, from the decision of the Court of Review in the preceding case. An application had been made by the petitioners' counsel to Sir *George Rose* for a special case, which his Honor refused to certify, on the ground that the question was solely one of fact. The petitioners then presented this petition of appeal, which, after detailing the same statement of facts as was contained in the petition in the last case, prayed that the Order of the Court of Review might be reversed, and that the proof might be expunged.

Where a petition of appeal was presented to the Lord Chancellor, after one of the Judges of the Court of Review had refused to certify a special case, on the ground that the question was one of fact, the petition was dismissed, with costs.

Mr. *Temple*, and Mr. *Koe*, in support of the petition, stated the reason why the matter did not come before the Court by way of special case, instead of by petition.

Mr. *Swanston*, and Mr. *F. Bayley*, *contra*.

Lord COTTENHAM, C.—I do not see how any doubt could arise as to the 200*l.*; that is clearly proveable.

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The 400*l.* is questionable; but, as it is stated that Sir *George Rose* said this was entirely a question of fact, which I do not very well perceive how it can be so considered, I will confer with him before giving judgment.

On a subsequent day, his lordship ordered the petition of appeal to be dismissed, with costs; but with liberty to apply to the Court of Review for a re-hearing.

Ex parte WOODWARD.—In the matter of TURNER.

CASE 3.

Westminster,
May 1, 1838.

A. and *B.* make a joint promissory note, ten years after the date of which, *B.* executes an assignment of his property in trust for his creditors, under which a dividend is paid to the holder of the note; *A.* becomes bankrupt:—*Held*, that the payment of the dividend under *B.*'s assignment, being after the Statute of Limitations had already run, did not revive the debt, as against *A.*, so as to enable the holder to prove on the note, under the fiat against *A.*

THIS was a petition for re-hearing the petition in the last case but one (*a*), which prayed that the proof of a debt might be expunged, on the ground of its being barred by the Statute of Limitations.

Mr. *Temple*, and Mr. *Koe*, in support of the petition. The point to be argued on this petition for re-hearing is, whether a promissory note, made in 1822 by three persons, can be established in proof, in 1837, against one of the makers, on the ground of the two other makers of the note having made payments in part of the amount; when there has been no payment whatever, either in respect of principal or interest, by the bankrupt, the other joint maker. It is now provided by the 9 *Geo.* 4. c. 14. s. 1., that where there are two or more joint contractors, no joint contractor shall be bound by "reason only of any written acknowledgment or promise made and signed by any other or others of them." [*Erskine*, C. J. The

(a) See *ante*, p. 290.

section goes on to provide, "that nothing therein contained shall alter or take away, or lessen the effect of, any payment of any principal or interest made by any person whatever."] But the payment of interest in this case is not an acknowledgment, within the words of the statute. A payment on account, too, is merely evidence of an acknowledgment. Ten years had run from the date of the promissory note for 400*l.*, when the payment was made under the assignment from *William Tongue*. The only ground of the rejection of the appeal by the Lord Chancellor was this: his lordship saw an indorsement on the proposed special case (made by one of the Judges of this Court) in these words, "matter of fact, not within the act;" upon which his lordship said, he did not perceive how it could be considered a question of fact, but that he would confer with the Judge who made the indorsement. Having done so, his lordship said, he was informed by the learned Judge, that the question of law was not argued before the Court of Review; that being the case, his lordship said, he could not hear the appeal, but would give the petitioners liberty to apply to this Court for a re-hearing.

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Sir GEORGE ROSE.—If the case went to the Lord Chancellor on any mistake, it was quite right that it should come back to this Court to have it rectified. I told the parties, that a material point stated in the special case was not argued in this Court; and I further told them, there was every disposition in this Court to set the matter right by a re-hearing. I now repeat, that the essential fact on which this case turns, was not brought forward on the former argument.

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Mr. *Temple*. If any mistake has arisen with regard to the special case, it is owing to the very unfortunate manner in which appeals are constituted in regard to special cases,—unfortunate for the parties, unfortunate for counsel, and unfortunate for the Court itself.

ERSKINE, C. J.—I wish it to be understood, that whenever a special case is brought to me, and the facts are correctly stated, I never refuse to sign it. I feel it to be my duty to certify the facts to the Lord Chancellor, leaving it to his lordship to reject the appeal, if it relates merely to a question of fact. Such is my practice. The case was argued here, on the ground that at the time of the bankruptcy of the debtor the Statute of Limitations had already run, and that the debt could not be revived, as against him, by the acknowledgment of another joint contractor.

Mr. *Temple*, and Mr. *Koe*. The words of the statute are clear, as to a written acknowledgment or promise; but leave the law, as to the effect of payment of any principal or interest, as it was when the act was passed; and the law is, that a payment by one joint contractor does not affect the other. [*Erskine*, C. J. According to the case of *Chippendale v. Thurston* (a), the payment of interest by one joint contractor did take a case out of the Statute of Limitations, previous to the statute of 9 Geo. 4. c. 14. That case appears to decide, that *payment* is distinct from *acknowledgment*, in the construction of the new statute. I admit, that if payment by a co-contractor is made after the statute is run, such payment would not revive the debt against the other co-contractor.] In this

(a) 1 Mood. & M. 411.

case, before any assignment was made by *Tongue*, who was one of the joint makers of the promissory note,—or before any payment was made under the assignment, the statute had already run. It is clear, therefore, that the proof for the 400*l.* must be expunged.

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Then, as to the 200*l.* debt, which is founded on a memorandum or acknowledgment dated the 17th June 1825, it is alleged, that interest has been paid on this sum; but this is not sufficient evidence of the debt, without evidence *aliunde*, either from the bankrupt, or some other person. Is there any acknowledgment of this debt by the bankrupt? The memorandum purports to be signed by the bankrupt; but it has never been properly verified. The mere payment of interest, however, by one of two joint contractors, even though within the six years, does not prevent the other joint contractor from availing himself of the Statute of Limitations; as appears from the case of *Brandram v. Wharton (a)*, where it was held, in an action by an indorsee against one of two joint drawers of a bill, that the proof of it under a commission of bankrupt against the other joint drawer, and the receipt of a dividend within six years, did not prevent the defendant from availing himself of the Statute of Limitations. [*Erskine*, C. J. The distinction in that case is, that the bill was not *proved*, but only *exhibited* as a security; the proof being for a larger sum for goods sold. The Court laid great stress upon that distinction, and thought that the case of *Jackson v. Fairbank (b)* had been carried quite far enough.]

Mr. *Swanston*, and Mr. *F. Bayley*, *contrà*. After the appeal has been dismissed, with costs, by the Lord Chan-

(a) 1 B. & Ald. 463.

(b) 1 H. B. 340.

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cellor, we object to this petition being heard at all; under such circumstances, the Court cannot entertain a petition for re-hearing. [*Erskine*, C. J. The dismissal was not on the merits, but because the appeal was not regularly before the Court.] It is submitted, that the mere fact of presenting a petition of appeal, is an election not to have a re-hearing. If the petition, however, is to be re-heard, there are two points for the consideration of the Court: 1st, as to the 200*l.*; 2nd, as to the 400*l.* [The Court here said, they were satisfied as to the right of proof for the 200*l.*] Assuming, then, that what took place since 1832, would take the case out of the statute, if the six years had not then expired, the question will be, whether, notwithstanding the statute had already run, those subsequent payments would not have the same effect. On this point, *Jackson v. Fairbank* (a) is clearly in favour of the right of proof. [*Erskine*, C. J. In that case, all the payments had been within the six years.] [Sir *George Rose*. The payment of a dividend, under a commission of bankrupt against one of two joint contractors, it must be admitted, takes a case out of the statute, as to the other; such is clearly the law, strange as it may appear; but that is only applicable to a debt not then barred, or, in other words, a debt then provable.] It has been decided, that a payment of interest by *A.*, on the joint and several promissory note of *A.* and *B.*, is evidence of a promise by *B.*, and takes the case out of the Statute of Limitations, although *B.* was only a surety; *Burleigh v. Stott* (b). [*Erskine*, C. J. In that case, again, the payment was made a few days before the six years expired; and one of the Judges dwelt on the point, that the party making the payment

(a) 1 H. B. 340.

(b) 8 B. &amp; C. 36.

was agent for the co-contractor.] But none of the Judges there made any reference to the fact of the time of payment, and founded their judgment upon quite a distinct ground. The statute does not destroy the debt, but the remedy. The statute, therefore, does not sever the contract, which is joint. The assignment made by *Tongue* (one of the joint contractors) in 1832, was equivalent to a payment; for it has been decided, that a payment, to take a case out of the statute, need not be in money, but may be in goods. [*Erskine*, C. J. In this case the note was dated in 1822, and the assignment was in 1832, and nothing had occurred in that period to take the case out of the statute. The statute had already attached. That point was dwelt on by Mr. Justice *Bayley*, in *Atkins v. Treadgold* (a).

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ERSKINE, C. J.—This is an application to expunge the proof of a debt, consisting of two several sums of 400*l.* and 200*l.*; and it is opposed upon two distinct grounds: first, that there has been a payment of interest by the bankrupt on one of the sums within six years; and, secondly, that there has been an acknowledgment of the other portion of the debt by a co-contractor within the like period. It is very true, that more than six years had elapsed before the issuing of the fiat; but then it is sworn by the respondent, that, with respect to the sum of 200*l.*, the bankrupt had paid interest on that sum on the 18th February 1834, which was within six years of the time of the proof; and that he also, on the 3d November 1835, signed an account, in which he acknowledged that there was a debt existing, on which two years and a half interest would be due on the 17th De-

(a) 2 B. & C. 23.

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ember 1835. It is impossible, therefore, not to say, that in 1835 the bankrupt admitted that 200*l.* was then due.

Then, as to the 400*l.* Any acknowledgment would formerly have taken a case out of the statute; but by Lord *Tenterden's* act (*a*) it is declared, that the acknowledgment must be in writing, and signed by the party chargeable; but that no joint contractor shall be chargeable "in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them;" and then it is provided, that nothing therein contained "shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." In regard, therefore, to the effect of any payment, the statute of 9 *Geo.* 4. c. 14., leaves the law as it was before that act passed. Then what was the law before that statute? In *Jackson v. Fairbank* (*b*) it was decided, that where one of two makers of a joint and several promissory note became bankrupt, and the payee received a dividend under the commission, on account of the note, this prevented the other maker from availing himself of the Statute of Limitations, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought. The decision in *Jackson v. Fairbank* was questioned in *Brandram v. Wharton* (*c*), but not overruled; and in *Burleigh v. Stott* (*d*) it was referred to and relied on by Mr. Justice *Holroyd*; and therefore still remains the law. At the former hearing of the present case, the Court thought there was not sufficient ground

(*a*) 9 *Geo.* 4. c. 14. s. 1.

(*c*) 1 B. & Ald. 463.

(*b*) 2 H. Bl. 340.

(*d*) 8 B. 8 C. 36.

for expunging the proof for the 400*l*. The facts have now been brought before the Court, which were not presented to its notice on the former occasion; and it appears not only that the payment of the dividend, under the assignment from *Tongue*, was made after the Statute of Limitations had already run, but that the assignment itself was executed more than six years after the debt accrued. The question then arises, whether, under these circumstances, one joint contractor can revive a debt as against another. Now, even if there were no authority on the point, I should have thought that this could not be done; because the only principle, on which one person can revive a debt against another, is, that he must be considered, for this purpose, the agent for that other; but it would be straining the fiction too far to say, that where a debt is barred by operation of law against one of several joint contractors, any other joint contractor can be considered his constructive agent to revive it. The case of *Atkins v. Treadgold* (*a*) is decisive of the present question. In that case *A.* and *B.* made a joint and several promissory note. *A.* died, leaving *B.* one of his executors, who, ten years after *A.*'s death, paid interest on the note, not in the character of executor, but personally, as one of the makers of the note; and an action was brought on the note, by the representatives of the payee, against the executors of *A.*; but it was held, that the payment of interest by *B.* did not take the case out of the Statute of Limitations, so as to make *A.*'s executors liable. It appears to me, therefore, that the proof for the 400*l*. must be expunged. I give no opinion as to how the law would be, if the assignment from *Tongue* had been within the six years; though

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(*a*) 2 B. & C. 23.

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it does not strike me, that that fact would have made any difference in the case.

Sir JOHN CROSS.—As I have not my notes of the former argument, I do not know the reasons that influenced the former judgment of the Court. But there is now so little doubt upon my mind, that I cannot imagine on what grounds the Court could have decided, as they did, on the former occasion. With respect to the 200*l.*, all depends upon the debtor and creditor account between the parties; in which account the 200*l.* was acknowledged to be due. But as to the 400*l.*, it is manifest that the creditor never pretended to have any claim for that sum. On the whole, I think it is clear, that the proof for the 200*l.* must stand, but that in respect of the 400*l.* it must be expunged.

Sir GEORGE ROSE.—The present re-hearing is satisfactory to the Court; for it is plain, that there has been a mistake as to fact somewhere. It is true, indeed, that all the affidavits, which have been commented on to-day, are entered as having been read on the former hearing; but it is one thing to have affidavits entered as read, and another thing to have the facts stated in them rendered prominent by counsel. I think I can take upon myself to say, that on the former occasion the argument did not proceed on the point, that the deed of assignment from *Tongue* was executed after the Statute of Limitations had run. The argument then proceeded merely on the fact, that the payment by the trustees took the case out of the statute. The payment of a dividend under a commission against one of two joint contractors, having been held to take a case out of the statute, as to the other joint



contractor, it became a question of how far the effect of a payment under a trust deed was analogous to payment of dividends under a commission. Under such circumstances, the Order of this Court was made. When the parties afterwards applied to me to certify a special case, I refused, because I considered it a question of fact, in which case I always refuse to certify; but I advised the parties to go before one of the other Judges, who entertained a different opinion on that point; and at the same time, I suggested a re-hearing: but the matter went before the Lord Chancellor, and was dismissed. As to the 400l.,—when the statute had already run, one of the joint contractors to the note was displaced from a position giving him any power to bind the other. I concur, therefore, in opinion with the rest of the Court.

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The ORDER was, that the proof should be reduced to the 200l. and interest; and that all parties should take their costs out of the estate.

Sir JOHN CROSS adverted to the inconvenience arising from a practice, which had become too prevalent, of the solicitors for appellants applying to the Judge at his private house to certify a special case; when, by the terms of the General Order, it ought to be left at the Office of the Registrar (a).

Practice, as to  
obtaining ap-  
proval of a  
Judge to a  
special case.

(a) GENERAL ORDER, 22 May 1833.

It is ordered, that every special case of appeal from this Court, tendered for the approval of one of the Judges, shall be left for that purpose at the Office of the Registrar, signed by the counsel for the respective parties, or accompanied by a certificate from the counsel for the appellant, that there is, in their judgment, good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party eight days prior to such tender thereof.

T. ERSKINE, C. J.  
J. CROSS, J.  
G. ROSE, J.

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Westminster,  
May 5, 1838.

Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before the order for sale.

Ex parte SCOTT.—In the matter of PEARSON.

THIS was the petition of an equitable mortgagee, for the usual order of sale, and praying also, that he might be allowed the rents of the estate from the date of a notice which he had given to the tenant, requiring the rent to be paid to himself.

Mr. *Bethell*, in support of the petition. The notice given by the petitioner is equivalent to an ejectment in the case of a legal mortgage, which entitles the mortgagee to the rents. After this notice, the mortgagor becomes trustee for the mortgagee; and therefore neither the mortgagor, nor his assignees, can retain the rent against the petitioner, who must be considered as a *cestui que trust*.

The COURT said, that in equitable mortgages the rents are never allowed to the mortgagee, which accrued before the date of the order of sale; unless there were such circumstances, as would induce a jury to infer that the mortgagor intended the mortgagee to receive the rents. Such cases may have occurred in this Court; but, as no inference of the kind can arise in this case, the petitioner must be content with the common Order.



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Ex parte LEWIS LOYD and others.—In the matter of  
IRELAND and HARRISON.

Westminster,  
May 25, 1838.

THIS was also the petition of equitable mortgagees for the usual order for sale of an estate belonging to the bankrupt *Harrison*, on which they claimed a lien, under the following circumstances :

*Ireland & Harrison* were partners, as dyers, at Lancaster. *Harrison* was also in partnership with *Bolton*, at Manchester. The petitioners were bankers at Manchester, carrying on business under the firm of *Jones Loyd & Co.* In the year 1836, *Harrison* and *Bolton* being indebted to the petitioners, and wishing a further advance, *Harrison* deposited with the petitioners the title-deeds of an estate belonging to himself, by way of equitable mortgage, accompanied with the following memorandum :

One of two partners deposits the deeds of his own estate, by way of equitable mortgage, to secure a partnership debt, and afterwards becomes bankrupt, the other partner being solvent : *Held*, that an order may be made for the sale of the equitable mortgage, but no proof allowed against the bankrupt partner, for the purpose of receiving dividends.

“ Messrs. *Jones Loyd & Co.*, bankers, Manchester.

“ Gentlemen,

“ Herewith you will receive a bundle of deeds relating to my property, situate, &c., which deeds are by me deposited with you as a security for the payment of the running balance, which, for the time being, may be accruing from Messrs. *Harrison & Bolton* to you or any of you, alone, or with any other partner or partners; and in consideration thereof, I hereby undertake, at my own expense, to complete such security, when thereunto required by you.

“ I am, &c.

“ *J. Harrison.*”

At the time of this deposit, the firm of the petitioners consisted of *Lewis Loyd*, *Samuel Jones Loyd*, *Edward*

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 and others.

*Loyd, L. Loyd the younger, and C. W. Tabor.* In December 1836, *Tabor* retired from the partnership, and the other partners continued to make advances to *Harrison & Bolton* up to July 1837, when *Harrison & Ireland* became bankrupts. The petition alleged, that by the bankruptcy of *Harrison*, the partnership of *Harrison & Bolton* was dissolved, and prayed the common order for the sale of the property, with liberty to prove for any deficiency against the separate estate of *Harrison*.

Mr. *Swanston* appeared in support of the petition.

Mr. *C. P. Cooper*, and Mr. *Archbold, contra*. This being a joint debt of *Harrison & Bolton*, and *Bolton* being a solvent partner, there cannot be any proof against *Harrison*, before recourse is had to the solvent partner. Secondly; the deposit was not made with the present firm of the petitioners, and therefore is no valid security to them. At the time of the deposit, the firm consisted of five partners, but when the advances were made, there were only four. The words of the memorandum of deposit are not strong enough to render the security available in law, under every possible change of the firm. There is another objection to any order on this petition; *Bolton*, the solvent partner, is not served with it, and therefore cannot be bound by any account taken behind his back, of advances alleged to have been made to the firm of *Harrison & Bolton*.

Mr. *Swanston*, in reply.

ERSKINE, C. J.—There is so much difficulty as to one part of the prayer of this petition, that I should have

been glad if the parties had consented to an order. But as to the argument, that the memorandum does not extend the security to the change of the firm, I think that is perfectly untenable. The memorandum was evidently intended to apply to any state of the firm, whether the number of parties increased, or diminished; for the words are "to you, *or any of you, alone, or with any other partner or partners.*" I feel great difficulty, however, in acceding to that part of the prayer of the petition, which seeks to prove any deficiency against the separate estate of *Harrison*; for there is nothing in the memorandum, to convert this into a separate debt as against him; and therefore it appears to me, that it would be improper to allow the petitioners to prove against his separate estate. The best plan will be, for the parties to consent that the amount of the proceeds of the sale shall be paid into Court; as there is no reason why it should be paid over. But unless an order is taken by consent, I feel so much difficulty in the matter, that I should wish to consider of my judgment.

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and others.

Sir JOHN CROSS.—I see no difficulty, in declaring the petitioners equitable mortgagees of the estate of *Harrison*; for it would be absurd to hold, that the memorandum of deposit did not operate as a security to the four continuing partners. But, with respect to the other part of the prayer of the petition which seeks to prove against *Harrison's* separate estate, I own I feel great difficulty, and therefore should wish a little time to reconsider that point.

Sir GEORGE ROSE.—The great difficulty in this case is, that a joint creditor cannot prove under the separate

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and others.

estate, in order to receive dividends; and therefore that consideration induces a doubt, whether we now can rightly order a sale, which is only done as ancillary to proof. But as there are other points involved in the right of proof, with a view to a vote in the choice of assignees, and signing the certificate, the Court is enabled to direct a sale, for the purpose of ascertaining what amount may be proved; so that, notwithstanding there may not eventually be any right of proof against the separate estate, yet the Court will be justified in ordering the sale.

Mr. *Swanston* consented to waive that part of the prayer of the petition, which sought to prove against the separate estate.

The COURT, upon this intimation, made the common Order.

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The Court of Review has no power to order any payment out of unclaimed dividends, or of the interest made from them.

Ex parte GREGG.—In the matter of WALMSLEY.

THIS was the petition of the assignee, praying to be allowed a portion of the costs incurred by him in working the commission, out of unclaimed dividends, and out of the surplus of the bankrupt's estate.

Mr. *Mylne* appeared in support of the petition.

The COURT said, that the new act of 5 & 6 Will. 4. c. 29. s. 7., deprived them of all power over the unclaimed dividends; but they ordered, that the costs of the assignee, which were properly and reasonably incurred

in working the commission, should be paid out of the surplus, such costs being previously taxed by the Registrar. They also referred it to the Registrar, to ascertain what unclaimed dividends were in the hands of the assignee at the time of filing the certificate directed by the act of parliament; and what had been paid thereout to the several creditors coming in and claiming their dividends; and ordered that the residue should be paid into the Bank, in the manner directed by the act.

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Mr. *Mylne*, on a subsequent day, applied to the Court for an Order, that the interest made from the unclaimed dividends might go towards payment of the assignee's costs; the interest not being specified in the act of parliament.

The COURT said, that the interest was merely accessory, and followed the principal; and that it therefore belonged to the creditors, who were entitled to the dividends.

Ex parte GOLDSMID.

MR. *M. A. Goldsmid*, having resigned the office of Official Assignee, now applied in person for an Order that he might be formally discharged from that office, and released from his duties under the several commissions and fiats specified in the certificate of Mr. Commissioner *Evans*.

Westminster,  
May 25, 1838;  
Order made, on  
the resignation  
of an Official  
Assignee.

The COURT made the Order as prayed, subject to the approbation of the Lord Chancellor; Mr. *Goldsmid*

1838.      undertaking to pass his several accounts from time to  
 ~~~~~  
 Ex parte time, as the several estates in the different bankruptcies
 GOLDSMID. should be respectively wound up.



Westminster,
 May 26, 1838.

Ex parte WATSON.—In the matter of CLARKE.

Where an application is made to substitute a new petitioning creditor's debt, during the pendency of an action, in which the defendant has given notice to dispute the debt, the Order must be without prejudice to the defence in the pending action.

THIS was a petition to substitute a new petitioning creditor's debt. It appeared, that there was a pending action brought by the assignees, in which the defendant had pleaded, and given notice to dispute the validity of the petitioning creditor's debt.

Mr. *Bichner* appeared in support of the petition.

Mr. *Wright* consented for the petitioning creditor, who was satisfied his debt was not sufficient.

ERSKINE, C. J.—As the action has gone so far as the plea, and the defendant has given notice to dispute the validity of the debt, the usual course is to make the Order, without prejudice to the defence in the pending action.

The other Judges concurring,

The ORDER was made as prayed, the petitioning creditor paying the costs of this petition; and the petitioner undertaking to give notice of this Order to the defendant in the action, and to abide by such Order, as the Court in which the action was pending should think just.

Ex parte WHITBREAD.—In the matter of LUPTON.

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THIS was the petition of an equitable mortgagee, for the common order of sale. It appeared that a sale of the property had already taken place, by agreement between the petitioner and the assignees, without the Order of the Court; but, the purchaser having objected to the title on that ground, the equitable mortgagee presented this petition.

Westminster,
May 26, 1838.

There is no necessity for an Order of the Court to sell an equitable mortgage, if all parties agree to the sale, without an Order.

Mr. *Bacon* appeared in support of the petition.

Mr. *Rogers*, for the assignees, contended, that there was no ground for the objection of the purchaser, and therefore that the petitioner must be at the sole costs of the Order.

The COURT said, that there was no necessity for presenting a petition for the sale of property under an equitable mortgage, if there was no dispute between the equitable mortgagee and the assignees, and all parties agreed to the sale. There is no ground, therefore, for the purchaser's objection. Consequently, if the petitioner wishes for the Order, he must pay the costs of this application.

Ex parte J. STEPHENSON.—In the matter of J. STEPHENSON.

Westminster,
May 26, 1838.

THIS was a petition of the bankrupt, to be paid a certain allowance, which had been made to him by the

Where the Commissioner made an Order, before the choice of

assignees, for a certain allowance to be paid to the bankrupt, it was held no objection that the memorandum of the Order was signed after the choice. And, when the assignees have agreed to make such allowance, they cannot afterwards withhold it, on the mere allegation that they have no funds in their hands.

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Commissioner and the assignees, under the provisions of the 6 *Geo.* 4. c. 16. s. 114., until he should pass his last examination. The adjudication of the bankrupt took place on the 8th December, and the choice of assignees on the 20th December. The allowance was claimed under the following documents:

“ In the Court of Bankruptcy.

“ London, 20th December 1837.

“ In the matter of *J. Stephenson*, a Bankrupt.

“ Memorandum, that upon the application of the bankrupt, I did order that an allowance, at the rate of 3*l.* per week, should be made to the bankrupt out of his estate, for the support of himself and family, from the 8th day of December, being the date of the adjudication in this matter, until assignees are chosen; such allowance being made subject to prior charges on the estate.

“ JOSHUA EVANS, Commissioner.”

“ 20th December 1837.

“ We the undersigned, being the assignees of the bankrupt's estate this day chosen by the creditors, do hereby propose that an allowance, at the rate of 3*l.* per week, shall be made to the bankrupt, for the above-mentioned purpose, from this day until the day appointed for passing the bankrupt's examination.

“ *R. Hockley*, }
 “ *A. Hockley*, } Creditors' Assignees.”

“ I approve of such last-mentioned allowance being made, subject to prior charges, as above mentioned.

“ JOSHUA EVANS, Commissioner.”

Mr. *Rogers* appeared in support of the petition.

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Mr. *Swanston*, for the assignees. The statute of 6 Geo. 4. c. 16. s. 114. only authorises the Commissioner to make the allowance, *before* the choice of assignees; and therefore he had no jurisdiction to make the first part of the Order, which is dated the very day on which the assignees were chosen. The Commissioner's power to make any allowance was then expired, and he had only authority to approve of such as the assignees might make. Moreover, there is not any fund in the hands of the assignees; and the bankrupt had, at the time of his bankruptcy, a large sum in his hands, of which he has given no satisfactory account; and the Commissioner has adjourned his last examination *sine die*.

ERSKINE, C. J.—I think the bankrupt is entitled to this allowance. There is evidence on the proceedings, that the Commissioner made the Order prior to the choice of assignees; and then they make an Order for the same allowance, until the day appointed for the bankrupt's last examination. There does not seem to be any sufficient reason for the assignees withholding the allowance.

Sir JOHN CROSS.—The Order of the Commissioner states, "I did order;" which implies, that the Order was in fact made by him *before* the choice of assignees. And after assignees were chosen, it appears that they themselves propose an allowance up to the 42d day. They have now instructed their counsel to state, that they have no funds in their hands; but they do not swear to

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STEPHENSON,

that fact, nor to any such deficiency in the estate of the bankrupt to make good the allowance.

Sir GEORGE ROSE.—If the assignees had any valid objection to make to the Order for this allowance to the bankrupt, they should have presented a cross-petition; not having done so, this Order is of course.

ORDERED as prayed. Costs of both parties out of the estate.

Ex parte CHARLES BOGUE.—In the matter of

CALEB BASUN.

Westminster,
May 28, 1838.

The bankrupt granted an annuity of 42*l.*, in consideration of 400*l.*, and received the whole of the consideration money, through the medium of the attorney employed by him in the transaction. Half an hour afterwards, at a different place, he repaid 100*l.* of this sum to the attorney, in discharge of a debt.—*Held*, that this was not a return or retainer of part of the consideration money, within the provisions of the Annuity Act; and that the value of the annuity was proveable under the fiat.

THIS was the petition of an annuity creditor, praying to have the annuity valued, and a reversionary interest in certain freehold property sold, which was charged with the payment of it, with liberty to prove for the amount of the valuation, after deducting the proceeds of the sale. The annuity deed was executed on the 2nd May 1837, by which the bankrupt, in consideration of 400*l.* then acknowledged to be received by him, covenanted to pay the petitioner an annuity of 42*l.* during the life of the bankrupt, and conveyed a reversionary interest in a freehold and copyhold estate, with a power of sale in case of default, for better securing the payment of the annuity. The whole of the 400*l.* was paid into the hands of the bankrupt by the attorney, who was employed by him in the transaction; but half an hour afterwards, the bankrupt returned to him 100*l.* of this

sum, in discharge of a debt he owed him. The payment of the 100*l.*, however, appeared to be a distinct transaction, and was made at a different place from that where the consideration money for the annuity was paid.

The petition was opposed by the assignees, on the ground that the requisitions of the Annuity Act, 53 Geo. 3. c. 141. s. 6., were not complied with; as part of the consideration money had been returned by the bankrupt.

Mr. *Swanston*, and Mr. *Keene*, in support of the petition. The words of the 6th section of the Annuity Act, as applicable to this case, are, "that if any part of the consideration for the purchase of any annuity or rent-charge shall be returned to the person advancing the same, or if the consideration, or any part of it, shall be retained, on pretence of answering the future payments of the annuity or rent-charge, or any other pretence," then the grantor of the annuity may apply to the Court, in which any action may be brought for payment of the annuity, to stay proceedings, &c. Now, we contend, in this case, that the 100*l.* was not returned, or retained, within the meaning of the act, but that the whole consideration money was *bond fide* paid by the petitioner to the bankrupt, and that the 100*l.* was paid by the bankrupt in discharge of a legal debt. It has been decided, that if it be agreed by the grantor and grantee of an annuity, that the former shall pay the expenses of the writings, and he, immediately after receiving the consideration money, pay the fair charges of the writings out of that money, no notice need be taken of it in the memorial; but it may be there stated, that the whole consideration

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money was paid to the grantor; *Mougs v. Leake* (a). The two cases, on which the other side perhaps will principally rely, are *Finley v. Gardner* (b), and *Williamson v. Goold* (c). In *Finley v. Gardner*, part of the consideration money for the annuity, amounting to 15*l.* per cent. upon the whole sum, had been immediately returned to the grantee for law expenses and for brokerage; and it was held, that this was a return of part of the consideration money to the party advancing the same, within the meaning of the 6th section of the Annuity Act; and the annuity was accordingly set aside, upon payment of principal and interest. But that case is very distinguishable from the present; for there the sum of 450*l.*, for law expenses and agency, was immediately returned to the grantee, besides the sum of 430*l.* for the purpose of securing the first year's annuity, in pursuance of a previous agreement between the parties. In *Williamson v. Goold*, the agent of the grantee, on paying the consideration money, retained a considerable sum for the expense of deeds, &c.,—two witnesses, who had been brought from a considerable distance for the purpose of attesting the annuity deed, having first retired; and it was held, that this was an illegal retainer, for which the grantee was responsible. But in that case, the consideration money being 4130*l.*, no less a sum than 3140*l.* was deducted by the attorney for arrears of a former annuity alleged to be due, and for law expenses, and only 990*l.* of the consideration money was paid over to the grantor; and the grounds of the decision of the Court were, that the grant of the annuity was fraudulently obtained. So in *Gorton v. Champneys* (d), the

(a) 8 T. R. 411.

(b) 6 B. & C. 165.

(c) 1 Bing. 234.

(d) Id. 287.

facts of which were very similar to those of the last case, great part of the consideration money was retained by the agent of the grantee, for a debt alleged to be due to himself. In *Calton v. Porter* (a), also, the attorney, who was the agent for both parties, insisted on the payment of 90*l.* out of the consideration money, as a debt due to himself, previous to the execution of the annuity deed, besides 50*l.* for preparing the deed; which the grantor submitted to, for fear the annuity would not be otherwise carried into effect. The same principle guided the Court in the subsequent case of *Henry v. Taylor* (b), where the attorney who negotiated the annuity, the consideration for which was 910*l.*, retained the whole of the consideration money, except 1*l.* and a few shillings, to pay off preceding annuities, and to satisfy the claim of 165*l.* made by the attorney for his trouble, although he had delivered no bill or statement of his charges for negotiating the business. In *Jones v. Silberschildt* (c), which is another of this class of cases, there was also a clear retainer by the attorney of 300*l.* out of the consideration money, for his trouble. But in *Aston v. Gwinnell* (d), where, on the grant of an annuity, the consideration money was, with the assent of the grantor, paid to a trustee, to be applied by him in payment of the costs of the annuity deeds, afterwards of certain debts due from the grantor to judgment creditors, and the surplus to the grantor; it was held, that this was not a retainer, within the meaning of the statute, so as to render the annuity void, notwithstanding the trustee was the partner of the grantee, and both of them were the solicitors employed in the transaction. So in *Phillips*

1838.

Ex parte
Booz.

(a) 2 Bing. 370.

(b) 3 Bing. 177.

(c) 4 Bing. 26.

(d) 3 Y. & J. 136.

1838.

Ex parte
Boone.

v. Crawford (a), where 30*l.* was, immediately after payment of the consideration money, paid by the grantor to the attorney, for the expense of the transaction, and not by way of any colourable reduction of the consideration; this was held not a sufficient objection to the annuity, and a bill to set it aside for this cause, was dismissed.

Mr. *Treslove*, and Mr. *Teed*, *contrà*, admitted that *Williamson v. Gould (b)*, was a hard case, as the grantee of the annuity had given no authority to the attorney to retain any portion of the consideration money, and was ignorant that he had done so. But here, no less than a fourth part of the whole consideration money was repaid by the bankrupt to *Harrison*, (who, it must be presumed, was the agent of the grantee,) only half an hour after the consideration money had passed to the bankrupt. And this brings it within the principle of the numerous cases, which have been already cited by the other side, and from which they have attempted to distinguish it.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—This case appears to me to depend on a simple question of fact, whether the 100*l.* was retained by the grantee, or returned to him, within the meaning of the Annuity Act. The object of the provisions of that act is to provide for the whole transaction relating to the grant of an annuity being fairly stated in the deed, with a view to the prevention of fraud. And if there had been any thing in the facts of this case, which amounted to fraud, or a contrivance to evade the provisions of the Annuity Act, I should have

(a) 9 Ves. 214.

(b) 1 Bing. 234.

thought that this petition should be dismissed. But there is nothing of that kind whatever in the case. It may be conceded, that if a party entrusts an agent with the payment of the consideration money for an annuity, he is bound by the acts of the agent, as to any retention or withholding of the money. But there is no dispute here, that the 100*l.* was not *bonâ fide* due to *Harrison*; and it was paid, too, at a different place from that where the contract for the annuity was completed. I see no cause whatever for holding that this payment is in contravention of the Annuity Act.

1838.

Ex parte
Boove.

Sir JOHN CROSS.—I am of the same opinion, and think the objection to the annuity has not been sustained. It has been contended, that *Harrison* was the agent of *Bogue*, the grantee of the annuity, in the payment of the 400*l.* to the bankrupt; but there has been no evidence to establish that position. There is no colour or pretence for saying, that the objection, as to part of the money being returned to the grantee, has any foundation in fact. This is not like most of the cases cited, where a large portion of the consideration money was retained by the agent of the grantee, under a previous stipulation made with the grantor of the annuity. There is nothing here to impeach at all the validity of the annuity deed. But even if it could be impeached on the ground of the objection set up by the assignees, a Court of Law would say, upon any application to set it aside, “you must first pay back the consideration money, before the deed is cancelled.” Therefore, supposing this objection to be tenable, I should still say, that the petitioner would have a right to prove for the amount of the consideration money. The objection, then, even if it had been sustained, would have amounted to nothing.

1838.

Ex parte
BOOZE.

Sir GEORGE ROSE concurred in opinion with the two other Judges; but said, there was no occasion for the petitioner to come to this Court to pray a sale of the property charged with the payment of the annuity, as it appeared from the deed, that he had a power of sale.

ORDERED as prayed, the petitioner undertaking to release to the assignees all right to any personal chattels comprised in the security in the petition mentioned.

Westminster,
May 29, 1838.

A charge in a solicitor's bill, for attendance to prevail on certain creditors to vote in the choice of assignees, and for preparing proofs for that purpose, renders the whole bill liable to taxation.

Ex parte EDWARD DAVIS.—In the matter of SHERRY.

THIS was a petition of the petitioning creditor, to tax a bill of costs of the solicitor employed by him, containing charges for extra business done after the choice of assignees; and to stay an action brought by the solicitor against the petitioner, to recover the amount. The common bill of costs had already been taxed by the Commissioners, and paid out of the estate; but this was a bill for general business done, amounting to 269*l.*, and containing, among other charges, the following items:

- s. d.
- “ Attending Mr. *M.*, the solicitor of Messrs. *H.*, several times, and the latter this day, to ascertain the amount of their debt, and to prevail on them to vote with you in the choice of assignees, &c. 13 4
- “ Attending Mr. *E.* to ascertain the particulars of his debt, and to solicit his vote, &c. . . 6 8
- “ Drawing and engrossing Mr. *H.*'s proof. . 6 8
- “ Drawing and engrossing affidavit of the execution by Mr. *H.* to power of attorney, &c. 6 8.”

There were other items in the bill of a similar nature, which related to business done in the bankruptcy, and to the preparation of proofs, in order to command the choice of assignees.

1838.

Ex parte
DAVIS,

Mr. *J. Russell*, in support of the petition. The question is, whether the items in the bill of costs, relating to the preparation of proofs, and the choice of assignees, do not render it liable to be taxed by an order of this Court; and indeed, whether the mere relation between the parties of petitioning creditor and solicitor, in a matter of bankruptcy, does not give this Court jurisdiction to make such order. There are no items contained in the bill, of charges for business done in any other Court; therefore, if the bill is not taxable here, it cannot be taxed any where. But this Court, independently of any power on this subject given it by the act of parliament, has jurisdiction to order the bill of any one of its solicitors for taxation. In *Ex parte Smith (a)*, the Lord Chancellor made an order in bankruptcy, under the 2 *Geo. 2. c. 23. s. 22.*, for the taxation of a solicitor's bill for striking a docket, and a journey to get an affidavit of debt, on the ground of this being business relating to the bankruptcy; and a similar order was made by this Court, in *Ex parte Cass (b)*. It was decided also in *Ex parte Williams (c)*, that this Court has power to order the taxation of a solicitor's bill, in which was contained a single item of charge for attending before the Commissioner on behalf of an equitable mortgagee. And in *Smith v. Taylor (d)*, it was held, that charges by an attorney, for attending and advising a party after he had

(a) 5 Ves. 706.

(b) 4 Deac. & C. 718.

(c) 1 Deac. 469.

(d) 7 Bing. 259.

1838.

Ex parte
DAVIS.

been served with a writ, were taxable items, and rendered the whole bill liable to taxation.

Mr. *Bethell*, for the solicitor, said he was unable to oppose the order for taxation ; upon which

The COURT ordered it to be referred to the Registrar, to tax the bill, as between solicitor and client, not as between petitioning creditor and estate ; and that the action should be stayed, the petitioner paying the costs up to this time, and undertaking personally to pay what shall be found due on taxation.

Westminster.
May 29, 1838.

It is not multifarious, to pray for the taxation both of the solicitor's and messenger's bills ; but the petitioner should not pray costs against the messenger.

Ex parte PRING.—In the matter of DAVIS.

THIS was the petition of two creditors, for taxation of the petitioning creditor's bill of costs, and also of the messenger's bill, both of which had been paid to the agent of the solicitor to the petitioning creditor.

Mr. *Pigott* appeared in support of the petition.

Mr. *Ayrton*, for the solicitor and petitioning creditor, objected, that the petition was multifarious, as it included the solicitor's and messenger's bills in one petition ; thus bringing two distinct matters before the Court.

Mr. *Anderdon* appeared for the messenger.

ERSKINE, C. J.—The petitioning creditor is bound to pay the costs of working the fiat up to the choice of assignees, and then he is to be reimbursed out of the

estate; but the act of parliament gives any creditor, to the amount of 20*l.*, the right of petitioning to tax the bill, if he is dissatisfied with the taxation of the Commissioners. The two bills of the solicitor and messenger constitute, in fact, but one bill. It does not seem right, however, to pray costs against the messenger. But I think the bills are both taxable on this petition, without reference to the liability of the messenger to costs.

1838.

Ex parte
PRING.

The other Judges concurred in over-ruling the objection.

Mr. Pigott. The reason for praying costs against the messenger is, that he has made an improper charge of 10*l.* for a valuation of the effects seized by him, which he had no right to do.

Sir GEORGE ROSE.—It does not follow, because this charge is objected to by the petitioners, that it will be disallowed. The common rules of taxation do not apply to the messenger's bill; the allowance of his charges being regulated by the quantum of work and labour properly done by him for the benefit of the estate. I think the messenger should not have been brought before the Court.

ERSKINE, C. J.—If costs had not been prayed against the messenger, probably he would not have appeared.

The ORDER was, that the bills should be referred to the Registrar to be taxed; but that the petition, as against the messenger, should be dismissed, with costs, to be paid to him, in the first

1838.

Ex parte
PRING.

instance, by the petitioners; but in case one-sixth should be taken off the messenger's bill, then the solicitor was to reimburse the petitioners the amount of the messenger's costs.

Ex parte HAWARD.

Westminster,
May 29, 1838.

A petition is necessary to set aside an order. It cannot be done on motion.

MR. J. RUSSELL moved to set aside an Order, which, he contended, had been irregularly obtained.

Mr. *Bethell*, *contra*, objected that the application ought to be by petition, and not by motion.

Mr. *J. Russell*. It is the practice in the Court of Chancery to make an application of this kind by motion.

The COURT said, that in bankruptcy, the proper course was to present a petition, to set aside an Order; and

Dismissed the petition, with costs.

Westminster,
June 1, 1838.

Where an assignee was chosen, without his authority, and declined to act, the costs of a new choice were ordered to come out of the estate.

Ex parte PEARSON.—In the matter of STEPHENSON.

THIS was the petition of a creditor, praying that there might be a new choice of assignees. It appeared that Mr. *Tweddall*, one of the assignees already chosen, had declined to act, having been elected to the office in his absence, and without his knowledge, on the representation of Mr. *Pratt*, the other assignee, who stated at the

meeting, that Mr. *Tweddall* would accept the office, but without any authority from Mr. *Tweddall* for saying so.

1838.
Ex parte
PEARSON.

Mr. *Anderdon*, in support of the petition, submitted, that as there was no suggestion of any default on the part of *Tweddall*, the costs of this application, and of the meeting for the new choice, ought to come out of the estate.

Mr. *Swanston*, *contra*, contended that the costs ought to be paid by the petitioner.

ERSKINE, C. J.—If any case of default had been made out against *Tweddall*, or against *Pratt*, the other assignee, then no doubt one of those parties should be made to pay the costs. But, under all the circumstances, I think the costs ought to come out of the estate.

Sir JOHN CROSS.—In consequence of the creditors having, unauthorized, chosen *Tweddall*, who declines to act, it becomes necessary, for the benefit of the estate, that another election of assignees should take place; and therefore the costs ought to be paid out of the estate.

Sir GEORGE ROSE concurred.

ORDERED as prayed.



1838.



Ex parte UNDERHILL.—In the matter of GEORGE
BISHTON.

Westminster,
June 8, 1838.

Two of three assignees caused certain property of the bankrupt's to be sold, and executed a conveyance to the purchaser; but the third declined to execute it, on the ground that the sale had taken place without his authority, and that he was not satisfied it was for the benefit of the estate. On a petition by the purchaser, for an Order on the third assignee to execute the deed, the Court refused such Order, without a previous reference to the Registrar, to inquire whether the sale was beneficial to the estate, and whether the conveyance was a fit and proper deed to be executed by the assignee.

THIS was the petition of a purchaser of part of the bankrupt's property, praying that one of the assignees might be ordered to execute a conveyance of it, which had been prepared on the part of the petitioner.

The petitioner had been in partnership with the bankrupt and with *William Bishton*, as coal and iron masters, under the firm of "The Parkfield Company," at Sedgley, in Staffordshire; the petitioner being entitled to two eighth shares, *George Bishton* to four eighths, and *William Bishton* to two eighths. On the 3d September 1835, a fiat issued against *George Bishton*, and on the 30th September another fiat against *William Bishton*, under which they were respectively found bankrupts; when the debts of the copartnership amounted to 160,000*l*. Under the fiat against *Geo. Bishton*, *Henry Hill*, *Henry Crutchley*, and *Joseph Shore*, were chosen assignees. The petitioner alleged, that after the bankruptcy of the two *Bishtons*, it was arranged by a committee of the creditors of the partnership, that the shares of the two bankrupts in the Parkfield Company should be purchased, and that a new Company should be formed, consisting of such of the creditors as would agree to the arrangement, for the purpose of carrying on the works; it being considered that the creditors would sustain less loss by that means, than if all the property were brought to the hammer. That most of the creditors acquiesced in this arrangement; and of those who did not, some had been paid by the new Company, and others had accepted a composition on their debts. On the 26th Fe-

bruary 1836, the four shares of *George Bishton* in the concern called "The Parkfield Company," subject to various charges thereon and the debts of the partnership, were put up to sale by auction before the Commissioners under his fiat, at Wolverhampton, when the petitioner was declared the highest bidder, and the purchaser, at the sum of 40*l.*; and on the same day the two shares of *William Bishton* were in like manner put up to sale, and the petitioner was also declared the purchaser of these for the sum of 20*l.* It was alleged, that a schedule of the property, and of the particulars of what it consisted, and a list of the debts owing, were produced at the sale, and the Commissioners directed the auctioneer to read them audibly to the company, before the biddings were opened; and that *Joseph Shore*, the assignee against whom this petition was presented, was at Wolverhampton in the morning of the day of the sale, and was present when the conditions of sale were discussed at a meeting of the committee of the Parkfield creditors, and did not then make any objections to the sale, which was about to take place in the afternoon of the same day. It did not appear, however, that he was present, or took any part, at the sale. A conveyance was prepared from the assignees, and other necessary parties, to two trustees on behalf of the New Parkfield Company, and was executed by two of the assignees; but *Joseph Shore*, the other assignee, declined to execute it.

The prayer was, that *Joseph Shore* might be ordered to execute the above-mentioned conveyance; or that it might be referred to the Registrar, or the Commissioners, to look into the deed of conveyance, and state whether it was a fit and proper deed to be executed by the

1836.

Ex parte
UNDERHILL.

1838.

Ex parte
UNDERHILL.

assignee; and that *Joseph Shore* might be ordered to pay the costs of this application.

In answer to the petition, it was stated by Mr. *Shore*, that he was not consulted about the sale of the property, and that the deed of conveyance was tendered to him for execution, before he had an opportunity of seeing if it was correct.

Mr. *Swanston*, and Mr. *Ellison*, in support of the petition. In reply to the objection of the assignee, it is sworn, that he was invited to attend the sale, and that he said it was then inconvenient to him to do so, having other engagements; but that he did not make any objection whatever to the sale. The sale was a regular sale by auction, under the conduct of the Commissioners. If the Court should not make an Order on the assignee to execute the conveyance, and should direct an inquiry, it ought to be a limited inquiry; for the majority of the assignees have joined in the sale, and have executed the conveyance; and therefore the Court will not presume, that those two assignees have not done their duty. [*Erskine*, C. J. Do you contend, when two of three trustees sell the trust property against the will of the third trustee, that a purchaser can call upon the third trustee to execute the conveyance, and that the Lord Chancellor would decree a specific performance against the third trustee, before he was satisfied that the sale would be for the benefit of the *cestui que trusts*?] The third assignee in this case had notice of the sale—he had, therefore, the means of knowing whether the sale would be beneficial to the estate; and if he had then any doubts on the subject, he might have stated them to the Commissioners, who were present at the sale.

Mr. *Bacon*, and Mr. *Armstrong*, *contra*, were stopped by the Court.

1838.


Ex parte
UNDERHILL.

ERSKINE, C. J.—This is an application to the discretion of the Court, in the exercise of its control over its officers, to compel an assignee to execute a particular form of conveyance, which has been tendered to him for his signature. Now, where the Court is satisfied that an assignee ought to do any act, in the discharge of the duties of his office, that may be advantageous to the bankrupt's estate, this Court would order prompt measures for the performance of the assignee's duty, without putting the complaining party to a more expensive remedy. If on the present occasion, therefore, we were perfectly satisfied, that the sale which has been effected, and the deed of conveyance which has been prepared, were both respectively beneficial to the bankrupt's estate, we should make the Order that is prayed for by this petition. The case made out in support of the petition is, that two of the assignees concurred in the sale, and that the third declined to join in it. Now, what is the fact? It appears, that at a sale which took place of part of the partnership property, it was bid for and purchased by one of the partners. It is not at all improbable but that this might have deterred other persons present at the sale from bidding in competition with such a purchaser, and that the assignee, who has declined to execute the conveyance, might have had good reason to be dissatisfied with the conduct of the sale. It appears to me, therefore, before the Court grant any Order against the third assignee to compel him to execute the proposed deed of conveyance, that it should be made

1838.

Ex parte
Underhill.

quite clear to us, that the sale and the deed itself are for the benefit of the estate.

Sir JOHN CROSS.—With regard to the jurisdiction of the Court in this matter, I think there is no doubt but that we could compel the assignee to execute the conveyance in question, provided the Court was satisfied, under all the circumstances, it was right that he should do so. What are the facts? It is not disputed, that the sale which has been effected was a *bonâ fide* sale—it took place before the Commissioners, and two years have elapsed since it occurred, without any objection having been made to it by the third assignee; and there is no evidence whatever to impeach the validity of the sale. The assignee, who now refuses to concur in the sale, resided within fourteen miles of the solicitor to the fiat, and of the property in question; and it appears, that he was at Wolverhampton in the morning of the day when the sale took place. It is impossible to infer, under all the circumstances, that he was ignorant that the sale was about to take place in the afternoon of that day. It seems that he never acted as assignee; for it is sworn, that he had notice of the meeting to audit the assignees' accounts, but that he did not attend, leaving the whole business of the audit meeting to the two other assignees. I own that the inclination of my mind is, that Mr. *Shore* knew very well of the intended sale, and that he left the management of it to the two other assignees, who acted for the benefit of the estate. It being a strong measure, however, to compel an assignee to execute a particular conveyance, I accede to the inquiry whether the sale is really beneficial to the bankrupt's

estate; and I am the more inclined to do so, as the petitioner himself made it part of the prayer of his petition.

1838.

Ex parte
UNDERHILL.

Sir GEORGE ROSE.—The regular course of dealing with this subject, if a bill had been filed in the Court of Chancery against a trustee for the execution of a trust, would be to refer it to the Master, to inquire whether the sale was for the benefit of the *cestui que trusts*, and if so, to settle the proper form of conveyance to be executed by the trustee. This Court is bound, as a trustee for these creditors, to see that there is no sacrifice of this property. The assignee tells us, that he cannot execute this conveyance, without being satisfied that the sale has been for the benefit of the creditors. Would it not be unjust, therefore, for this Court to say, that the assignee shall be compelled to execute this contract, without due inquiry? It is material, also, to see how far the bankrupt's estate will be indemnified against the claims of the partnership creditors. The very circumstance of *George Bishton's* share in the property having only produced 40*l.* at the sale, and *William Bishton's* but 20*l.*, convinces me that there were numerous and important claims on the partnership property, and that the price given for it by the petitioner was the surplus of the value of the property, after all the partnership claims should be wound up. The proper Order, which occurs to me for the Court to make in this matter, is, to refer it to the Registrar, to inquire and report whether this sale should be carried into effect; and if so, whether the deed of conveyance, that has been tendered to the assignee for execution, is properly adapted to that object; in which case, and not till then, it will be time enough for this

1838.

Ex parte
UNDERHILL.

Court to make an Order that the assignee shall execute the deed.

The ORDER was, that it should be referred to the Registrar to inquire whether it would be beneficial or not to the bankrupt's estate, that the sale of the shares should be carried into effect, either in the mode suggested by the proposed deed of conveyance, or in any and what other manner, in protection of the assignees, and the bankrupt and his estate; and if the Registrar should find that the sale should be carried into effect, then that the Registrar should look into the proposed deed of conveyance, and ascertain whether it was a fit and proper deed to be executed by *Joseph Shore*, and, if necessary, to settle and approve of any supplemental or other deed of conveyance; reserving further directions, and costs, until after the Registrar should have made his certificate; with liberty for either party to apply to the Court.

Westminster,
June 9, 1838.

The mere circumstance of a petition being ordered to stand over, on the application of a party, does not prevent that party from filing fresh affidavits.

Ex parte WORTHINGTON.—In the matter of OULTON.

IN the course of the hearing of this petition, which was for expunging a proof,

Mr. *Swanston*, in support of the petition, was proceeding to read an affidavit which was filed on the 6th June,

Mr. *Anderdon*, *contra*, objected to its being read, on the ground that the petition had been ordered to stand over for ten days, to suit the convenience of the petitioner; and that on the 8th June, which was the very day when the petition ought to have been heard, pursuant to the order for enlarging the time, the petitioner filed this affidavit.

1838.

Ex parte
WORTHINGTON.

ERSKINE, C. J.—I have always understood, that the mere circumstance of a petition standing over, does not prevent a party from filing fresh affidavits, unless the order for the enlargement contain a special provision to that effect. But the affidavit having been filed so late, that is a reason for an application for time to answer it, if it should be found to be material.

The COURT permitted the affidavit to be read.

Ex parte NEWALL.—In the matter of NEWALL.

THIS was the petition of the bankrupt to annul the fiat, on the ground that he was not a trader. It appeared, that the bankrupt rented a farm of 160 acres of land, which he used as a pasture for sheep; and that he was in the habit of purchasing a lot of 150 sheep at a time, 100 of which he kept upon his farm, and sold the remainder at 1s. profit per head. The sheep were generally sold without shearing them, and within a fortnight after they came to his farm. The bankrupt stated,

Westminster,
June 11, 1838.

A farmer, who is in the habit of buying half as many more sheep as was necessary to stock his farm, and of selling the surplus at a profit, is a trader within the bankrupt law, as a sheep salesman.

An affidavit, stating the substance of what a witness de-

posed to before the Commissioners, is not admissible, for the purpose of contradicting his affidavit in support of a petition, but only with a view for the Court to decide whether they will order the witness to be examined *vidæ voce*.

1838.


Ex parte
NEWALL.

that the reason why he bought more sheep than he wanted to stock his farm with was, for the purpose of selecting those he liked best; as the sheep were bought by him at a distance, the Isle of Anglesea, and he merely sold those which he thought would not answer his purpose. It appeared in evidence, however, that on several occasions after a fresh lot of sheep had been purchased by him, the parties who came to deal with him, examined the whole lot, and selected those which they preferred.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. The question is, whether the bankrupt bought the sheep for the purposes of his farm, or with a view to sell them again for a profit. Now the profit he got of 1s. a head was merely nominal, as the sheep came all the way from Anglesea. But in order to make a man a bankrupt, there must not only be a selling for profit, but a selling for the purpose of getting his living by the commodity in which he deals. In *Summersett v. Jarvis* (a), it was decided, that a man who was a keeper of hounds, and bought dead horses for his dogs, and then sold the skins and bones for a profit, did not thereby become a trader.

N. B.—It appeared that a witness of the name of *Rogerson*, who was employed by the bankrupt to purchase sheep for him, had been examined by the Commissioners, on the opening of the fiat, in support of the act of trading; and that he had now made an affidavit, in support of the bankrupt's petition to annul the fiat.

Mr. *J. Russell*, for the petitioning creditor, was pro-

(a) 3 Brod. & Bing. 2.

ceeding to read an affidavit of one *Bostock*, who swore, that he was present when *Rogerson* was examined before the Commissioners in support of the trading, and that *Rogerson* then deposed "*as follows*," (setting out *verbatim* the several questions put, and the answers given.) The object of the affidavit was, to show that *Rogerson* stated facts before the Commissioners contradictory to those in his present affidavit.

1838.

Ex parte
NEWALL.

Mr *Swanston*, and Mr. *Anderdon*, objected to the affidavit of *Bostock* being read, as it detailed the particulars of an examination taken behind the back of the bankrupt; and if the examination itself could not be read against the bankrupt, it follows, that the affidavit of *Bostock*, which incorporates the examination, cannot also be read. Moreover, the other side has given no notice that this examination would be read, on the hearing of this petition. It was decided, in the case of *Ex parte Chambers* (a) before the Lords Commissioners, that the examination of a third party before the Commissioners, which is taken behind the back of the bankrupt, cannot be read in evidence against him, on his petition to supersede. But, whether the examination of *Rogerson* before the Commissioners is, or is not, admissible,—at any rate, secondary evidence of its contents cannot be received, any more than where an examination is taken down in writing before a magistrate, parol evidence of its contents is not admissible, but the examination itself must be produced.

Sir GEORGE ROSE.—There must be some mistake in the report of *Ex parte Chambers*, as to the rejection of the evidence.

(a) 1 Deac. 197.

1838.

Ex parte
NEWALL.

Mr. *Deacon*, *amicus Curie*, hoped he could take upon himself to say, that the report of the case would be found correct. Two of the Lords Commissioners, the present Lord Chancellor and the Vice Chancellor, were furnished with copies of the report directly it was published, and he never heard that either of them had expressed any disapprobation of it, as to its accuracy.

Mr. *J. Russell*, and Mr. *Bacon*, *contra*. *Chambers's* case does not apply. The question is, whether a party, who has made an affidavit of some facts, cannot be contradicted by an affidavit of *A. B.*, stating what that party has said on some other occasion.

ERSKINE, C. J.—That is not exactly the point. Here you attempt, through the medium of a third person, to offer in evidence what another party has said before the Commissioners, giving the whole of his deposition in evidence, which was taken down in writing, sworn to by him, and signed by himself.

Mr. *J. Russell*, and Mr. *Bacon*. If one party makes an affidavit of a particular fact, another party has a right to state, by affidavit, any thing which the first-mentioned party has stated on the subject-matter upon some other occasion. There is nothing, on the face of our affidavit, to render it inadmissible to be read.

Mr. *K. Parker*, for the assignees. The object of the affidavit of *Bostock*, is to test the accuracy of *Rogerson*, who has made an affidavit in support of the petition, and has so contradicted himself, that no reliance can be placed on what he says. The affidavit itself, having

been filed in the office, and the other side having taken a copy of it, is sufficient notice that the deposition incorporated in it was intended to be read.

1838.

Ex parte
NEWALL.

ERSKINE, C. J.—It appears to me, that the respondents have proceeded in an irregular way, by incorporating the deposition in the affidavit, and thus attempting to give the deposition in evidence, which could not otherwise be done. The only purpose, for which this affidavit could be received, would be, with a view to see whether a *vivâ voce* examination of *Rogerson* was expedient, but not for the purpose of contradicting him. It seems to me, that the only mode, by which the respondents can be allowed to contradict him, would be, to swear that they would not believe him on his oath. Then, as to the objection made to the affidavit, on the ground of its being merely secondary evidence of the contents of the deposition,—you certainly cannot take the evidence of a by-stander of what a party said on a legal examination taken down in writing, without producing the deposition itself. But the deposition itself would not be evidence to contradict the statement of *Rogerson* in his affidavit, unless you made affidavit that he was not to be believed on his oath, and then referred to the examination itself. The only ground, as I have already said, on which this affidavit can be held to be admissible, is with a view to a *vivâ voce* examination.

Sir JOHN CROSS.—The evidence, to which an objection has been made, consists of an affidavit, which states that one *Rogerson*, when before the Commissioners, stated so and so, upon which occasion his examination was taken down in writing. Now, this is open to two

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objections. In the first place, a party has no right to make a partial statement of what the witness said before the Commissioners; and, for any thing which we can collect from the affidavit, it may be a garbled statement of what passed before the Commissioners; as it does not profess to set forth the *whole* examination. But then the question arises, whether the deposition itself could be read in evidence, which is taken behind the back of the party to be affected by it. We should recollect what is done in the Courts of Common Law with depositions taken before magistrates. If a man be charged with an offence before a justice of the peace, and a deposition of a witness be taken down in writing, the deposition is not receivable in evidence, unless by the statute of *Philip & Mary (a)*, and then only in case of the death or wilful absence of the party. But we all know, that if a witness gives a contradictory account at the trial of what he has sworn before the magistrate, the Judge takes up the depositions, and re-examines the party in open Court, and observes on the facts in his charge to the jury. Very much the same thing might have been done in this Court, if the witness had been summoned here to give evidence *vivâ voce*; for his examination before the Commissioners would then have furnished the Court, or the counsel, with the means of cross-examination. If the respondents in this case had wished to contradict *Rogerson*, therefore, they should have applied for a *vivâ voce* examination.

Sir GEORGE ROSE.—The affidavit, which the respondents have offered in evidence, contains a mere abstract of what *Rogerson* stated before the Commissioners. The

(a) 2 & 3 Ph. & M. c. 10; and see 1 Phil. on Ev. 370.

question, as it strikes me, is, whether, as this party has been examined before the Commissioners, and I find it asserted on oath that he has contradicted in his affidavit what he stated in his examination before the Commissioners, I cannot look at his deposition before the Commissioners, to see what it was that he really stated on that occasion. There can be no doubt, I think, that the Court has a right to look at this deposition. But then there is another question, namely, whether the petitioner should not have an opportunity of answering the affidavit, and explaining the contradiction; for I cannot divest my mind of the effect produced on it by what is stated in the deposition.

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The affidavit was rejected.

Mr. *Russell*, Mr. *Bacon*, and Mr. *Parker*, as to the point of the trading, were then stopped by the Court.

ERSKINE, C. J.—The only question, as to the trading, is one of fact, viz. whether the acts of buying and selling sheep by the bankrupt were merely accessory to the enjoyment of his farm, or whether they do not show an intention generally to deal as a sheep salesman. It is clear, that if the bankrupt only occasionally sold the sheep which he did not want for the purposes of his farm, he would not be a trader within the bankrupt law. The question then is, whether the various acts of selling sheep were mere accidental dealings, or whether they did not constitute a regular system of dealing. It is plain, from the affidavits, that he bought sheep and sold them again in a much more extensive way, than a mere farmer is accustomed to deal in them. It is stated, that

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on more than one occasion, a lot of sheep, which he had shortly before purchased, were sold just as they were bought, without shearing, or any pasturing on his farm. And it is also stated, on affidavit, that the sheep were generally sold within a fortnight after they arrived at the farm. On this evidence, I think it is impossible to say, that the bankrupt did not pursue the trade of a sheep salesman, within the meaning of the bankrupt law.

Sir JOHN CROSS.—The evidence of *Bostock* throws a good deal of light upon the nature of the dealings of the bankrupt. *Bostock* swears, that he is in the same line of business as the bankrupt, and carried on the trade of buying and selling sheep, along with his occupation of a farmer. It has been suggested by the counsel for the petitioner, that the reason, why the bankrupt bought more sheep than he wanted to stock his farm with, was for the purpose of selecting those he liked best. But, according to the evidence in the case, it appears, that the persons to whom he sold them were the parties who selected them; for they chose out of the bankrupt's stock any sheep that suited them best, when they were offered for sale. It is rather strange, however, that the question should have been brought before this Court; for the bankrupt never asserted before the Commissioners, that he was no trader, nor made any objection, until an after-thought appears to have struck him, that he should prefer taking the benefit of the Insolvent Debtors' Act, when he found that a fiat in bankruptcy was too hard to deal with.

Sir GEORGE ROSE concurred.

Petition dismissed.

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Ex parte EDWIN GEE.—In the matter of THOMAS
SAWER.

Westminster,
June 12, 1838.

THIS was the petition of the bankrupt's clerk, to be allowed six months' wages in full, under the 6 Geo. 4. c. 16. s. 49. The petitioner alleged that the bankrupt, at the time of his bankruptcy, was indebted to him in the sum of 247*l.* 4*s.* 1*d.*, for the balance of his wages, which were 250*l.* per annum. He therefore claimed to receive the half of this sum, namely, 125*l.*, from the assignees, and to be permitted to prove for the residue. The petition also prayed, that the payment of a dividend might be stayed, until a meeting could be had for the petitioner to prove his debt. It appeared, that about a year before the fiat issued the bankrupt's affairs were in a state of insolvency, and that he had made an assignment of his property for the benefit of his creditors, when his clerk left his service; but the bankrupt continued trading up to the period of his bankruptcy.

A clerk, who voluntarily leaves his master twelve months before his bankruptcy, because he finds he is becoming insolvent, is not entitled to six months' wages in full, under the 6 Geo. 4. c. 16. s. 49.

Mr. *K. Parker*, in support of the petition, cited *Ex parte Sanders* (a), where it was held, that a clerk, who left the bankrupt's service six months before the fiat issued, merely because he was unable to pay him any further salary, was, nevertheless, entitled to receive six months' wages in full, under the provisions of the act of parliament.

ERSKINE, C. J.—If a clerk voluntarily quits the service of his master, because he finds his master is becoming insolvent, and remains away from the service

(a) 2 Deac. 40.

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for twelve months, it is rather too much to say, that he is to come in for six months' salary, to the prejudice of the other creditors of the bankrupt. If the petitioner in this case was compelled to leave, that indeed may make a difference. There must be a reference, therefore, to inquire into the real cause of the petitioner leaving the bankrupt's service; and if the petitioner does not prosecute the reference, the petition should be dismissed, but without costs.

Sir JOHN CROSS thought, that no Order should be made except to dismiss the petition; as the petitioner had asked to open a dividend, without giving any sufficient reason, why he did not make an earlier application to the Court.

Sir GEORGE ROSE concurred with the Chief Judge.

The ORDER made was, to refer it to the Registrar, to inquire at what time, and under what circumstances, the petitioner quitted the bankrupt's service; and that, if the inquiry was taken by the petitioner, the assignees should reserve enough to meet the petitioner's claim; but if the inquiry was not taken, that the petition should be dismissed, without costs; the assignees to take their costs out of the estate.



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Ex parte WILLIAM ELLIOTT.—In the matter of GEORGE JERMYN.

THIS petition was in the paper for further directions.

The facts of the case are stated in a former report, *ante*, Vol. ii. p. 179. It was a petition to prove a debt, for which the petitioner had taken the bankrupt's goods in execution; but as the act of bankruptcy was committed previous to the levy, the execution could not be sustained. While the petitioner was in possession of the bankrupt's goods under the execution, the landlord distrained upon them for 78*l.* 15*s.* for half a year's rent, which the petitioner paid to the landlord in the presence of the bankrupt, for the purpose of releasing the goods, and which payment the bankrupt did not object to. The petitioner had sold part of the goods for 49*l.* 1*s.*, which he urged ought to be retained by him in part satisfaction of the sum of 78*l.* 15*s.*, which he had paid under the distress. On the former hearing, the Court thought that the sum of 78*l.* 15*s.* constituted no debt due to the petitioner from the bankrupt, and that it was a voluntary payment made by the petitioner in his own wrong. But the Court said, that if the creditors were to permit the petitioner to retain the 49*l.* 1*s.* as a compensation for the benefit conferred on the estate, by releasing the goods from the distress for rent, they would do no more than justice. And it was understood, that the parties acceded to this arrangement, in compliance with the recommendation of the Court. This arrangement, however, was denied by the assignees, who afterwards brought an action to recover the 49*l.* 1*s.*; but on the 8th May 1837, an Order was made that the

Westminster,
June 13, 1838.

A. levies an execution against *B.*, and while in possession of the goods, the landlord distrains them for rent, which *A.* pays, to relieve the goods from the distress. *A.* becomes bankrupt, having committed an act of bankruptcy before the levy, by which *A.*'s execution is defeated, and the assignees possess themselves of the goods.—*Held*, that the rent paid by *A.* to the landlord, was so much money had and received by the assignees to their use, and that *A.* was entitled to set it off in account with the assignees.

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ELLIOTT.

49*l.* 1*s.* should be paid into Court, and the assignees be restrained from proceeding in the action against the petitioner.

Mr. *Swanston*, and Mr. *Bacon*, on behalf of the assignees, now applied for an Order on the petitioner to pay the 49*l.* 1*s.* to the assignees, together with the costs of this application. The case stood for judgment on the 22nd March 1837, when the petition was dismissed, but no order was made as to the rent. The petitioner paid the rent after the act of bankruptcy, and he could, therefore, have no lien for the amount on the goods. He was a stranger, making a voluntary payment in his own wrong. This is a very distinguishable case from that of an executor paying money, when the letters of administration are afterwards repealed. The assignees of a bankrupt take the bankrupt's property under a statutable title, exempt from every charge imposed on it. There has been no ratification of this payment by the assignees; nor is there any pretence for saying, that the petitioner, in making the payment, can be considered as the agent of the assignees.

Mr. *Anderdon*, *contra*, was stopped by the Court.

ERSKINE, C. J.—I confess I should be much grieved on the present occasion, if the law compelled me to say, that the petitioner must pay over this sum of money to the assignees. The former Order was hard enough upon the petitioner; but strict law required that he should institute a prosecution against the bankrupt, before a proof could be allowed. The landlord put in a legal distress for the 78*l.* 15*s.*, for arrears of rent;

which the petitioner was obliged to pay, to redeem the bankrupt's goods; and it would be a hard case on the petitioner, even if the assignees had received no benefit from the payment, that the whole loss should fall on the petitioner; but it would be most unjust, when they have received an essential benefit from the goods being exonerated from the distress, that the petitioner is to go wholly without any reimbursement. We must look on this application, as if it was an action brought by the assignees for money had and received by the petitioner, for their use. That action, which is the only one that the assignees could maintain at law for the recovery of this money, is always looked upon by the Courts as an equitable action; and the Judge puts it to the jury, whether the plaintiff has in conscience a right to recover. As the assignees, therefore, would not be able to recover this sum in an action at law against the petitioner, I think they are not entitled to receive it under any Order of this Court.

Sir JOHN CROSS.—I am of the same opinion. The question was not so fully discussed upon the former hearing; but I am now satisfied that we have jurisdiction to make an Order, declaring that the petitioner has a right to retain the 49*l.* 1*s.* If there had been assignees appointed at the time of the payment of the rent by the petitioner, then it might, perhaps, have been said with more reason, that he paid it in his own wrong. But there were no assignees at the time; and the petitioner did then what was the best thing to be done, to release the bankrupt's goods from the clutches of the landlord.

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Sir GEORGE ROSE.—The distress put in by the landlord being paramount to the execution, or the act of bankruptcy, the money paid by *Elliott* to clear the goods from the distress was so much money paid by *Elliott* to the use of the assignees.

The ORDER was, that the injunction should be perpetual as to restraining the assignees from proceeding in the action at law; that the petitioner might take the 49*l.* 1*s.* out of Court; that the costs of the injunction, and of this application, should be paid to the petitioner by the assignees out of the bankrupt's estate; that the petitioner should pay the costs already incurred in the action, as well as the sum of 6*l.* 18*s.* 6*d.*, which had been previously tendered by him.

Ex parte THOMAS BOOKER.—In the matter of JOSHUA RAWLINS.

Westminster,
June 13, 1838.

An assignee, who had acted for more than two months under the fiat, but the proof of whose debt had been rejected by the Commissioner, applies to annul the fiat, for want of a good petitioning creditor's debt, contrary to the wishes of the other assignee, and the other creditors.

—*Held*, (on a petition for rehearing) that he was not in a situation to call on the Court, for this cause, to annul the fiat.—Sir *J. Cross*, dissent.

On a petition for rehearing, in order to render an affidavit admissible, which contains additional facts within the petitioner's knowledge on the former hearing, he ought to file a supplemental petition.

THIS was a petition for rehearing a petition by one of the assignees to annul the fiat, for want of a good petitioning creditor's debt. The former petition was heard on the 23rd April last (*a*), when an Order was made that the petition should be dismissed, without costs, but giving the petitioner the option to be discharged from the office of assignee. Sir *J. Cross*, however, differed in opinion with the two other learned Judges on the former occasion, and thought that the fiat should be

(*a*) See *ante*, p. 232.

annulled, unless another creditor should, within a given time, come in and apply to substitute another debt.

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Mr. *Swanston*, and Mr. *K. Parker*, in support of the petition. One of the grounds assigned by his Honor the Chief Judge for refusing to annul the fiat, on the application of the petitioner, was, that the petitioner, knowing all the circumstances of the alleged invalidity of the fiat, chose, nevertheless, to take upon himself the office of assignee. Now, it is sworn by the petitioner, that he was not allowed by the other assignee to examine the proceedings, and that he knew nothing whatever of the grounds on which the fiat was founded; but that he afterwards had occasion to consider the question, and had then reason to believe, that the petitioning creditor's debt was invalid, and that *Rawlins* had committed no act of bankruptcy. The debt of the petitioning creditor arose from certain pecuniary advances made to the bankrupt by a Mr. *Unwin*, as the acting agent or officer of an establishment, called the "Tuscan Building Company," of which the bankrupt was a shareholder. These advances were made by the company, which would not entitle *Unwin* to be a petitioning creditor, as the company was not incorporated by act of parliament. It was objected on the former occasion, that *Booker*, being an assignee, could not petition to annul, without undertaking to issue another fiat. But it is submitted, that it is the duty of an assignee, when he suspects the validity of a fiat, to come to the Court for assistance. In *Ex parte Graves (a)*, which was cited by the other side on the former occasion, Lord *Eldon* did not mean to say, that an assignee could not apply to supersede when

(a) 1 G. & J. 86.

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a commission was decidedly invalid; but, merely, that the application ought to be watched with jealousy by the Court; and in one part of his judgment he says, "If, after the assignees are appointed, when they have the power of examining the proceedings, looking to the insufficient evidence put upon the proceedings, they feel doubtful of the petitioning creditor's debt, and the act of bankruptcy, are they not to call upon the petitioning creditor to produce his proof, and is not the petitioning creditor bound to give explanation upon explanation, until the whole difficulty be cleared up?" It was objected, too, on the former hearing, that another petitioning creditor's debt might be substituted, if this should be held a bad one. But there is no evidence whatever of any debt, in amount sufficient to constitute a good petitioning creditor's debt, that accrued subsequently to the debt on which the present fiat is founded. Besides, a fiat confessedly illegal cannot be sustained, because there may possibly be another debt that may be substituted. [*Erskine*, C. J. The Court thought, on the former hearing, that the assignee had not done all that he ought to do, to support the fiat, before he came with a petition to annul.] The Court can never mean to sanction a fiat illegally issued. Mr. *Swanston* was then proceeding to read an affidavit of additional facts, which was filed on the 2nd June.

Mr. *Bethell*, for the petitioning creditor, objected to its being read, as the affidavit did not contain any fresh evidence discovered by the petitioner since the former hearing, but was for the purpose of making out an entirely new case, on facts within the petitioner's knowledge on the former occasion.

Mr. *Swanston* contended, that there was a distinction in this respect between a rehearing, and an appeal; and that, though in the latter proceeding fresh evidence was not admissible, yet it was admissible on a rehearing.

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Sir JOHN CROSS.—I take it, that the former petition was dismissed, because the assignee had not had an opportunity of seeing, whether there was any other debt that could be substituted for the debt of the petitioning creditor. It appears, that he has now been able to do so, and produces his evidence on that head.

Sir GEORGE ROSE.—The proper mode to render this affidavit admissible, would be to file a supplemental petition, stating the grounds of the application for a rehearing.

Mr. *Swanston*, and Mr. *K. Parker*, undertaking to do so, the affidavit was read. It was omitted to be observed on the former occasion, that *Booker*, besides being assignee, was a creditor of the bankrupt. He was therefore fully justified in applying to annul an illegal fiat. Then with regard to the act of bankruptcy, which was alleged to be a departure from the dwelling-house to delay his creditors,—the evidence in support of it was, that the bankrupt was heard to say, that he went away, for fear of being arrested; but the evidence now before the Court shows, that, when the bankrupt left his house, there was no creditor who *could* then arrest him.

Mr. *Flather*, for the other assignee. The petitioner does not come here to issue another fiat, but to with-

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draw the fund entirely from the jurisdiction of the Court. The petitioner attempted to prove his debt, but it was rejected by the Commissioner.

Mr. *Bethell*, for the petitioning creditor. The petitioner, for no other reason than because he is disappointed in proving his debt, and has not the management of the proceedings, now applies to this Court to annul the fiat. He is not a creditor, for his proof has been rejected; he makes this application against the wish of his co-assignee, and without any instigation from any of the creditors. The petitioning creditor offers to give the petitioner any indemnity that the Court may think proper, to protect him from all liability in working the fiat; the validity of which is not impeached by any person whatever having an interest in the question. A Court of Equity, when a trustee applies to it for protection, says, you may relinquish your trust, or take an indemnity from those persons whose interests you represent. The petitioner here is a mere legal trustee, with a bare office in him; and is therefore not competent to raise the question, as to the validity of this fiat, even supposing there was no sufficient act of bankruptcy, or good petitioning creditor's debt. The petitioner, having no interest himself, comes here to try the validity of a proceeding, which other parties, who are interested, are desirous to uphold. If, in *Ex parte Graves (a)*, where Lord *Eldon* reluctantly made the Order, an application such as this had been made to him, he would never have sanctioned it. The petitioner does not come here to be indemnified, but to set aside, as a trustee, that proceeding in which the *cestui*

(a) 1 G. & J. 86.

que trusts alone are interested. As assignee, it is true, he has a right to petition the Court; but only for his own protection. Independently of the objections already urged, the affidavits show that the petitioner has acquiesced in the validity of the fiat; for it appears, that long after he was appointed assignee, he desired the other assignee to do certain acts, which, he must have well known, could not be done, if the fiat was invalid.

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Mr. *Swanston*, in reply. It was not because the petitioner's debt was rejected by the Commissioner, that he now seeks to annul the fiat; for his proof was rejected on the 19th January, and he was afterwards chosen assignee; and it was not till four days after the choice, that he found the petitioning creditor's debt was invalid, and suspected the act of bankruptcy was concocted; and he then gave notice to the petitioning creditor, that he meant to dispute the fiat. This is not like the case of a trustee of a private trust. The fiat stands as illegal before the Court—the assignee is an officer of the Court—he has a right, therefore, to come and inform the Court, that its process has been abused. If any officer of the Court, before an Order is carried into effect, or process issued upon it, discovers that the Order has been improperly obtained, or the process wrongfully issued, is he not justified in stating to the Court, that the Order is invalid, and the process issued on a wrong foundation? But the petitioner is something more than a mere officer of the Court—he is a party interested; for he swears that he is a creditor; which is not disputed by the other side, notwithstanding the Commissioner rejected the proof. As to the indemnity that is offered to the petitioner, it is unjust, that the bankrupt's estate should be mulcted, to

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support this illegal fiat; for the property, out of which the indemnity is to come, does not belong to the other assignee who proffers the indemnity, but to *Rawlins*, the bankrupt. The Court ought not to be instrumental in carrying on an illegal proceeding.

ERSKINE, C. J.—Taking it as a position always recognized in Courts of Bankruptcy, that the annulling a fiat is a matter entirely in the discretion of the Court, yet in all cases where a creditor or assignee applies to the Court to supersede a fiat, the Court is in the habit, invariably, of calling on the petitioning creditor to support it. But here the petitioner is not a creditor, for the proof of his debt has been rejected by the Commissioner, and he has not appealed from the Commissioner's decision; we are, therefore, not bound to consider this petition as the petition of a creditor, but merely as that of an assignee. But it is then said, that, in his character of assignee, he has a right to take care that the fiat is not illegal; and when he discovers it to be so, he is justified in coming to this Court to supersede it. But here the petitioner accepts the office of assignee, and continues to work the fiat, until he has a dispute with the other assignee as to the appointment of the solicitor, and then calls on the petitioning creditor to support the fiat. In the present case, there is no party interested in the fiat, who makes any objection to it. It seems to me, that the Court would not be justified in annulling a fiat, on such an application; and that the petitioner is only entitled to be relieved from his office of assignee, or to be indemnified, if he chooses to continue in it. The Court has no objection to consider this as a new petition; but, taking it as a fresh petition, the petitioner has

no right to call on the other assignee to support the validity of this fiat, when the petitioner himself has no interest in the question.

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Sir JOHN CROSS.—This case appears to me to involve a question of great importance. I never yet heard, that any Court of Justice has been determined, at all hazard, to force one of the parties to its process to carry on an illegal proceeding. The fiat here is found to be clearly invalid. The debt, on which it was issued, was no debt whatever of the petitioning creditor, but one that was due to the Tuscan Building Company. It has been objected, that the petitioner, who seeks to annul this fiat, is bound to substitute another debt. I am not aware, that there is any authority for that position; at least, I can find no authority on the subject in the books of Reports. But, even supposing it to be the law, that a creditor petitioning to supersede is bound to substitute another debt, does any one pretend, in this case, that it is possible to do so? Is there any debt due to any creditor, which has been incurred not anterior to the debt on which this fiat was sued out? It appears to me, that there was a confederacy between the *Unwins* and the bankrupt to support a fraudulent fiat. And if there is any reason to think, that the other assignee was colluding with the *Unwins* for that purpose, what right have we to say, that the petitioner shall be compelled to go on working this fiat, on being indemnified by the other assignee? Was it not right, that the petitioner should look into the fraudulent proceedings between the *Unwins* and the bankrupt? I think it is perfectly competent to the assignee to make this application, now he has found out that the fiat is invalid. The case of *Ex parte*

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*Graves (a)*, before Lord *Eldon*, was not the same as this. When that case was first heard before the Vice-Chancellor, he considered that the assignees were estopped from applying to supersede a commission. So far, indeed, the two cases are parallel. But when it came on before Lord *Eldon*, he said, "If the Vice-Chancellor was wrong in his decision, the blame ought to attach upon me; for, in the conversation to which his Honor alluded, I certainly intimated an opinion, that assignees could not present such a petition. I was satisfied, however, that I stated the rule too broadly." Now what do I say here? Merely, that an assignee is not estopped from applying to annul a fraudulent fiat, he being himself in no way implicated in the fraud. In any judicial proceeding brought by the assignees for the recovery of the bankrupt's property, there must be strict proof given of the commission of an act of bankruptcy, and of a valid petitioning creditor's debt. No property can be recovered for the benefit of the bankrupt's creditors, unless those requisites are satisfactorily proved. Then, are we to desire the creditors to go on with the working of this illegal fiat, until the evil is past remedy? I deny that the assignee is bound, at all events, to support the fiat. His first duty is to satisfy himself of the validity of the fiat; and if he discovers that it cannot be sustained, his duty is then to come to this Court for advice and assistance. It would be not so much the denial of justice, as the furtherance of injustice, for this Court to compel an assignee to work a fiat, of the invalidity of which there is not a shadow of doubt. It is said, however, that all the parties interested in this matter, that is, all the creditors, are desirous to support the present fiat. But

(a) 1 G. &amp; J. 86.

there is no evidence of that before the Court. We are bound to say, I apprehend, which of these two assignees is in the right—the one who seeks to annul an illegal fiat; or the other, who, with the knowledge of its invalidity, tries so anxiously to uphold it. It is then contended by the respondents, that the petitioner, if he be dissatisfied with the fiat, may resign his office of assignee. But I do not know, that we are called on to require him to resign. He is a trustee for all the creditors; and any creditor is grievously injured by the continuance of this fiat. If he has no wish to resign, therefore, or has not committed any default, I do not think we can compel him to resign. If I had been his counsel, I should certainly have said to him, “Go to the Court of Review, and inform them of this illegal fiat, and they will immediately order it to be annulled.” I have gone somewhat at large into the circumstances of this case, because I have the misfortune to differ with my learned colleagues; and what passes now may be drawn into a precedent hereafter. I am of opinion, that when a fiat is discovered to be clearly invalid, for want of a good petitioning creditor’s debt, it is no part of the duty of an assignee, before he applies to annul it, to look out for another creditor, to substitute a debt; but that we are bound to annul a fiat, when we are satisfied it is invalid.

Sir GEORGE ROSE.—I think it would be doing an injustice to the creditors, looking at all the circumstances of this case, to annul the fiat. When an application is made to this Court to supersede a fiat, we must be actuated by the conduct and character of the party who makes the application. Now, what is the character of this petitioner. He is merely a trustee,

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without any interest in the trust property; for when he claimed to prove a debt under the fiat, his proof was rejected by the Commissioner; and he has not appealed from that decision. It therefore appears to me, that we are not bound to supersede a fiat, on the application of an assignee not interested in the bankrupt's property, against the wish of the other assignee. The allegations in this petition for re-hearing do not state fairly, what the Order of the Court was, upon the former hearing. It is stated, that the Court dismissed the former petition, with costs; but the Court offered an alternative to the petitioner, either to be discharged from the office of assignee, or to have the petition dismissed; and the petitioner preferred the latter. That Order was made, to protect the parties interested in the bankrupt's property from having a fund withdrawn, which ought to be divided amongst the bankrupt's creditors. Much has been said of the right of an assignee to apply to this Court, to supersede an invalid fiat. But I say, it is the duty of an assignee to come at the earliest time, to tell the Court of the invalidity of a fiat. Here, the fiat was issued in November, and the assignee, after being a party to various proceedings under it, does not make any complaint of its invalidity till the 9th of February, which was after the bankrupt had passed his last examination. I have always considered it to be a decisive answer to an application by an assignee to supersede a commission, on the ground of its invalidity, if the petitioning creditor will say to him, "I will indemnify you; or, if you think you cannot execute the trusts safely, you shall be allowed to retire from the office of assignee." The creditors will be benefited, and the bankrupt will be benefited, by the upholding of this fiat; and although there may be a

difficulty as to bringing actions, yet the bankrupt may concur with the assignees, and the action be brought in his name, if proof cannot be adduced of a good petitioning creditor's debt. It ought to be perfectly well known, that in all cases of this description a supersedeas is considered by the Court, not as a matter of adverse litigation between two parties, but as a proceeding connected with the administration of the bankrupt's estate. If the petitioner cannot get a substituted debt to support the present fiat, the next question is, whether, in case we direct a supersedeas, he is not bound to issue a new fiat. But then the petitioner does not appear to have a proveable debt to support a fiat. The Court has to steer between two difficulties. It has, therefore, to support the present fiat, if it can, for the benefit of the bankrupt, as well as for the benefit of the creditors who are desirous of availing themselves of it.

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Sir JOHN CROSS.—A point has been alluded to, as to the lapse of time that occurred before this petitioner applied to annul the fiat. I have not much considered that point, as my attention was not called to it by the arguments of counsel; but the alleged delay appears to have been satisfactorily accounted for, as the petitioner says he did not know of the defects of the fiat until he was appointed assignee; and shortly afterwards he presented this petition.

ERSKINE, C. J.—My judgment does not proceed upon the question, whether there is, or is not, a good petitioning creditor's debt, or a valid act of bankruptcy, to support this fiat; but that the petitioner, under all the circumstances, had no right to call on us to annul. I

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thought the preliminary objection was sufficient; and that the petitioner was not in a situation to raise the question, as to the validity, or invalidity, of the petitioning creditor's debt.

Petition dismissed, with costs.

Ex parte THOMAS BATE and WILLIAM ROBINS.—In the matter of JOHN BISHTON, WILLIAM JOHN JELlicose, EDWARD KEMPSON, and WILLIAM CALLUM.

Gray's Inn  
Hall,

July 11, 1838.

The bankrupts gave a joint and several promissory note for 2000*l.*, to secure advances made by their bankers; and when they were indebted to the bankers in 1957*l.*, one of the bankrupts mortgaged certain property to them to secure that sum, and all such further sums as might be advanced, to the extent of 3000*l.*, including the said sum of 1957*l.* At the time of the bankruptcy, the amount of the debt due to the bankers was 4365*l.*, of which sum they realized the 3000*l.* under the mortgage:—*Held* (*Erskine, C. J. dissent*), that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note, for the balance of their debt.

THIS was a petition to prove a debt against the separate estate of the bankrupt *Jellicose*, under the following circumstances:

The petitioners were bankers at Stourbridge, in Worcestershire; and the bankrupts carried on business in copartnership, at Bilston, in Staffordshire, under the name and firm of "The Caponfield Iron Company." On the 9th August 1834, the bankrupts opened a banking account with the petitioners, on the understanding that the petitioners would pay and advance no monies on account of the bankrupts, unless the amount was secured by the joint and several liability of the bankrupts. In pursuance of this arrangement, the bankrupts delivered to the petitioners a promissory note in the following form:

"Caponfield Iron Works, August 9th, 1834.

"On demand we jointly and severally promise to pay Messrs. *Bate & Robins*, or order, the sum of 2000*l.*, value received.

"*John Bishton,*  
*William John Jellicose,*  
*Edward Kempson,*  
*William Callum.*"



Between the 9th August and 29th September 1834, the petitioners paid and advanced, on account of the bankrupts, various sums of money, and also discounted for them various bills of exchange and promissory notes; and on the 29th September, the bankrupts were indebted to the petitioners, on account of these transactions, in a balance of 3000*l*.

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By an indenture, dated the 29th September 1834, and made between *Edward Kempson* of the first part, the said *Edward Kempson*, *John Bishton*, *William John Jellicose*, and *William Callum*, of the second part, and the petitioners of the third part, *Edward Kempson* covenanted to surrender to the petitioners certain copyhold property to the use of the petitioners, their heirs and assigns, subject to a proviso for making void the said indenture, if the bankrupts should, in manner therein mentioned, pay to the petitioners the sum of 1957*l*. 7*s*. 8*d*., together with interest at the rate of 5*l*. per cent. per annum, and all such further sums as were then due from the bankrupts to the petitioners, with such interest as aforesaid; and also should provide cash for, and pay all bills, notes, and drafts, which the petitioners respectively had already accepted, indorsed, or drawn, or which they, or the survivor of them, or other the persons for the time being constituting the firm of the said banking-house, should thereafter accept, indorse, or draw, for or in favour of, or at the request, or by the order, or on account of the bankrupts, as they should become due and payable; and also should thereafter pay unto the petitioners, or the survivor of them, or the banking firm for the time being, all such further sums, over and above the said principal sum of 1957*l*. 7*s*. 8*d*., as they or either of them should pay, advance, lay out, or expend,

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for, on account, or by the order, or at the request of the said bankrupts, or any of them, or which the petitioners, or the other persons constituting the firm of the said banking-house, should be called upon or be liable to pay by reason of the acceptance or indorsement of any bills, notes, or drafts already drawn or made, or to be drawn or made, by the bankrupts, or any of them, upon, or made payable by or at the banking-house, or at any other person's house or place whatsoever, which the bankrupts, or any of them, whether upon their own proper account, or jointly with any other person or persons, should by any means become indebted to the petitioners, or the banking firm for the time being; and all such costs, charges, and expenses, as they, or any of them, should pay or expend, suffer, sustain, or be put unto for or on account of any such negotiation, advance, loans, payments, acceptances, or indorsements, as therein-before mentioned, or in anywise howsoever; together with interest for such sums, at the rate of 5*l.* per cent. per annum, with commission, and other usual banker's charges. And the bankrupts thereby jointly and severally covenanted for the payment of the said sum of 1957*l.* 7*s.* 8*d.*, with interest after the rate of 5*l.* per cent. per annum, and also such further and other sums as before mentioned, with interest thereon, commission, and other usual banker's charges. There was also contained a proviso in the indenture, that the same should not at any time be a security for any greater principal sum, including the said principal sum of 1957*l.* 7*s.* 8*d.*, than the sum of 3000*l.*

The petitioners alleged, that this indenture was intended and understood to be not in any way a substitute for, or in lieu of, the said joint and several promissory note for 2000*l.*, but an additional security for the sum

then actually due from the bankrupts to the petitioners, or which should thereafter become due as therein mentioned: that no application was made at the time of the execution of the indenture, nor at any time since, to the petitioners, for the delivery up of the promissory note; and that the petitioners, on the faith of such note being an existing security, in addition to the mortgage, made larger advances to and on account of the bankrupts, than they would otherwise have done; and that, except on the faith of the existing security of the promissory note, they would not have paid or advanced, to or on account of the bankrupts, more than the sum of 3000*l*.

On the 28th April 1835, the fiat issued, when the bankrupts were indebted to the petitioners in the sum of 4365*l*. 3*s*. 7*d*., for principal money and interest, including the sum of 1957*l*. 7*s*. 8*d*.

On the 29th April 1836, the petitioners obtained an order for a sale of the above-mentioned copyhold property, and for an account; and that the petitioners might respectively be at liberty to bid at the sale, and that the proceeds of the sale should, after satisfying the expenses, be applied in paying what should be found due to the petitioners on the said security, not exceeding the principal sum of 3000*l*., and the interest due thereon, and that the surplus, if any, should be paid over to the said assignees; and that the petitioners should be at liberty to prove, for any deficiency, against the separate estates of the bankrupts.

The sale took place on the 24th day of June 1836, when the petitioner, *William Robins*, became the purchaser at the sum of 3500*l*.

On the 31st March 1838, a dividend on the separate estate of *William John Jellicose* having been previously advertised to be then made, the petitioner, *William*

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*Robins*, tendered a proof against the separate estate of *Jellicose* on the said promissory note for the sum of 1151*l.* 15*s.* 9*d.*, being the balance then due to the petitioners from the bankrupts; when the Commissioners rejected the proof, but admitted a claim for the amount.

Mr. *Swanston*, in support of the petition. The question in this case is, whether the deed of the 29th September 1834 operates as a merger of the promissory note for 2000*l.* [Sir *George Rose* cited *Ex parte Ladbroke (a)*, as an authority in favour of the petition.] It is submitted, that the deed and the note were concurrent securities. At the time the deed was executed to secure advances by the bank, to the amount of 3000*l.*, there was only 1957*l.* due on the promissory note for 2000*l.* The petitioners have sworn that the deed was not meant to interfere with the promissory note, but that the note was to be held as an additional security. The deed was a security to the extent of 3000*l.*, which sum the petitioners have deducted from the amount of their debt, and they come now to prove on the note for the balance due to them.

Mr. *Bethell*, and Mr. *Faber*, appeared for the respondents.

ERSKINE, C. J.—The question raised on this petition does not depend on any fact, that could have been stated on the other side; otherwise, I should have deferred pronouncing my judgment. Our decision in this case must turn entirely on the facts stated in the petition; though I cannot deny, that the circumstances in *Ex parte Ladbroke* go to the full extent of the prayer of this

(a) 2 G. & J. 81.

petition. The petitioners here, however, admit that the debt (to secure which the deed was executed) was the same debt, for which the promissory note was given ; for the only debt due on the 29th September 1834, when the deed was entered into, was the sum of 1957*l.*, which was less than the amount of the promissory note. Then, the bankrupts, by the deed, expressly covenant for the payment of this sum of 1957*l.*, and also “ all such further sums, over and above the said principal sum of 1957*l.*” as the bankers should afterwards pay or advance for the bankrupts. The covenant is to pay the debt then due, and all such further sums as might be due. It appears to me, therefore, that the deed was meant to cover the identical debt then due on the promissory note. If so, the security of the promissory note would be merged in the higher security of the deed. I am reluctant to set my opinion against that of the learned Judge, who decided the case of *Ex parte Ladbroke*, and should wish for the opinion of that tribunal, to which the law gives an appeal from this Court ; and I have still more reason to be diffident of my own opinion upon this question, as it is not supported by those of my learned colleagues.

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Sir JOHN CROSS.—It appears to me, in point of fact, that the case stands thus : The bankrupts apply to the petitioners to open an account with their banking-house. The bankers say, that they would advance them no money, except on their joint and several security. It is very material to keep this declaration in view, in order to come to a right conclusion on the case. A joint and several promissory note for 2000*l.* is then given by the bankrupts to the bankers, who make advances nearly to that amount. The bankers then say, we want some

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additional security for any further advances. They could not mean to give up the note. If the note was intended to be given up, why not cancel it? Instead of this, the note is permitted to remain in the hands of the bankers, after the additional security is given. It appears to me therefore manifest, that the note was intended to continue as a security to the bankers, independently of the mortgage. If so, the note remained in their hands as an available security; and the bankers can prove on the note, for the balance of their debt remaining due to them and unsatisfied by the money received under the mortgage.

Sir GEORGE ROSE.—This is a pure question of law; and my opinion proceeds on the meaning and effect of the instruments themselves, abstractedly considered. The nature of the transaction between these parties appears to me to have been a contract of indemnity, to the full extent of the two sums respectively specified in the two securities. It seems to have been intended by them, when the deed was entered into, that the existing promissory note should operate as a security for 2000*l.*, payable on demand, and that the deed should also operate as a security to the amount of 3000*l.* The contracts were directed to specific and distinct objects. The case of *Ex parte Ladbroke*, which was first decided by the Vice Chancellor, and afterwards confirmed by Lord *Eldon*, I think, ought to govern our decision of the present case. And it is right, that it should be mentioned to the Commissioners, that our opinion proceeds on that case.

Ordered, as prayed.

*Note* :—This case came afterwards before the Court, on a petition for rehearing, on the 19th January 1839, but the petition was dismissed, with costs.

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Ex parte WHITMORE and others.—In the matter of  
WARWICK and CLAGETT.

THIS was a petition of assignees, to expunge a proof made against the separate estate of *Warwick*, under the following circumstances.

*William Sidney Warwick*, one of the bankrupts, carried on business as a merchant in London, having extensive dealings with *Jackson, Riddle & Co.* of New York, and also with Messrs. *Abraham* and *James Warwick*, of Virginia, who were employed by *W. S. Warwick* to make large purchases of tobacco on his account. On the 20th June 1836, *W. S. Warwick*, the bankrupt, wrote to *Jackson, Riddle & Co.*, giving a credit upon them in favour of *A. & J. Warwick* for 100,000 dollars, with a view to provide payment for the different purchases of tobacco. *Jackson, Riddle & Co.* agreed to open this credit, and wrote to *A. & J. Warwick* to that effect; who thereupon drew three bills of exchange upon *Jackson, Riddle & Co.*, two for 15,000 dollars each, and one for 20,000 dollars, which *Jackson, Riddle & Co.* accepted on or before the 1st September 1836; when they wrote to *W. S. Warwick*, the bankrupt, to apprise him of such acceptances, and informed him, that when these bills were due, they would draw bills on him for such a sum in pounds sterling, as at the price of the day would yield the sum paid by them, together with their commission and charges.

On the 1st October 1836, *W. S. Warwick* took *Clagett* into partnership; which fact he announced in a letter of that date to *Jackson, Riddle & Co.*, wherein he thus expressed himself: "I beg that you consider all credits,

*Gray's Inn Hall,*  
*July 12, 1838.*

Upon the formation of a partnership between *W. and C.*, *W.* proposes to *J. & Co.*, to whom he was indebted for previous advances, to "consider all credits, advices, and instructions then in force from him as extending to the new firm, and to transfer any balances, that may be either due to or from him, to the new firm." To this proposal *J. & Co.* accede, and accordingly draw bills on *W. and C.*, on account of former dealings with *W.* The bills are not paid when due, and *W. and C.* became bankrupt. Held, that *J. & Co.*, after this adoption of *W. and C.* as their joint debtors, could not prove against the separate estate of *W.*, but only against the joint estate of *W. and C.*

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advices, and instructions now in force from me, as extending to the firm of *Warwick and Clagett*. They will hereafter address you; and upon receipt hereof, you will please render your accounts with me, transferring any balances, that may be either due to or from me, to the new firm."

On the 6th October *Warwick and Clagett* wrote to *Jackson, Riddle & Co.* as follows:—"Mr. *Warwick* has requested you to consider all advices, credits, or instructions in force from him as extended to us, which we beg to confirm; and we take this opportunity of expressing our hope that the present is the commencement of a correspondence, that will continue to our benefit and advantage."

On the 3rd November 1836, *Warwick and Clagett* addressed another letter to *Jackson, Riddle & Co.* containing the following passage:—"We have now to acknowledge the receipt of your esteemed favour of the 30th September, transmitting statement to Mr. *Warwick* to the 1st October, showing a balance at his credit on that date of 122,880 dollars, which has been examined and found correct. We enclose you Mr. *W.*'s statement of this account; showing a sterling balance due to him in cash, 1st October, 25,562*l.* 5*s.* 6*d.*, which we have transferred to debit of new joint exchange account with us, at par, 113,610 dollars; and we carry (agreeably to your request) the balance of premium and interest to new premises. We regard all subsequent operations as applying to the new firm, and have passed them accordingly."

On the 15th November 1836, *Jackson, Riddle & Co.*, wrote to *Warwick and Clagett*, acknowledging the receipt of their letters of the 1st and 6th October; in



which they added, "We shall make up and transfer to your new firm the open accounts in joint exchange transactions, but hope to have your account current, made up to ours, transmitted, before we carry the old account over to your firm; but, if not received, we will make up and transmit our account with you prior, by the next packet."

On the 19th November 1836, *Jackson, Riddle & Co.* paid the bill drawn by *A. & J. Warwick* for 15,000 dollars; whereupon *Jackson, Riddle & Co.* drew two bills upon *Warwick* and *Clagett*, amounting together to 3127l. 16s. 3d., and wrote to *Warwick* and *Clagett*, requesting them to honour the two bills when presented to them. On the 20th November, 1836, *Jackson, Riddle & Co.* paid the bill drawn on them by *A. & J. Warwick* for 20,000 dollars, and drew on *Warwick* and *Clagett* for the amount, and the commission at the current exchange. On the 30th November 1836, *Jackson, Riddle & Co.* paid the other bill drawn by *A. & J. Warwick* for 15,000 dollars, and on the 6th December drew upon *Warwick* and *Clagett* for 3114l. 11s. 5d., being the precise value thereof, with the addition of 1 per cent. commission, and three days' interest.

On the 7th December 1836, *Jackson, Riddle & Co.* wrote to *Warwick* and *Clagett* a letter containing a statement of their account with *A. & J. Warwick*, adding, "We also hand enclosed joint account current with your, *W. S. Warwick*, made up to 1st December, balance at credit of same as cash, 1st instant, 11,325l. 8s. at par, 50,305  $\frac{1}{10}$  dollars; and also joint premium account current connected therewith, showing a balance at creditor of same 4047  $\frac{5}{10}$  dollars cash, 1st December, which we hope will prove correct. We await your ac-

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count current, made up with interest, to same period, to carry the balance to your account."

Shortly after the date of this last-mentioned letter, *Jackson, Riddle & Co.* received the letter of *Warwick and Clagett* of the 3rd November 1836, and thereupon transferred the balance due from them to *W. S. Warwick* on the 1st October 1836, to the joint account of *Warwick and Clagett*.

The several bills drawn by *Jackson, Riddle & Co.* upon *Warwick and Clagett* were accepted by them in their partnership name, but were not paid when due.

On the 12th May 1837, a fiat was issued against *Warwick and Clagett*; under which *Jackson, Riddle & Co.* were allowed to prove for 10,410*l.* against the separate estate of *W. S. Warwick*, upon giving up the bills accepted by *Warwick and Clagett*.

This proof the assignees now prayed might be expunged.

In support of the petition, it was sworn by a confidential clerk of the bankrupts, that when the partnership was formed between *Warwick and Clagett*, all the goods and cash of *W. S. Warwick*, and the credit of 25,552*l.* due from *Jackson, Riddle & Co.*, were transferred to the partnership account of *Warwick and Clagett*; that the debts due to *W. S. Warwick* were, as the same were collected, paid over to the copartnership; and all consignments and remittances, which arrived subsequently to the formation of the partnership, although made to *W. S. Warwick* alone, went in like manner to the partnership; that all the bills drawn on *W. S. Warwick* were, from thenceforth, accepted by *Warwick and Clagett*, to the intent that the same might be paid out of the partnership funds; and that all the funds and pro-

perty of Messrs. *A. & J. Warwick*, which were in the hands of *W. S. Warwick* at the formation of the partnership, were in like manner transferred to the account of *Warwick* and *Clagett*. It also appeared by other evidence, that *Jackson, Riddle & Co.* continued to consign cargoes of tobacco to *W. S. Warwick* alone, but that the proceeds went to the partnership account.

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and others.

Mr. *Swanston*, Mr. *Lee*, and Mr. *Reynolds*, in support of the petition. The question is, whether *Jackson, Riddle & Co.* have a right to prove against the separate estate of *Warwick*, or against the joint estate of *Warwick* and *Clagett*. The Commissioner allowed the proof against the separate estate of *Warwick* alone, on the ground that it was originally his debt, and that the right of *Jackson, Riddle & Co.* to proceed separately against him was never discharged. But it is submitted, that this is not a correct view of the case. When the letter of *W. S. Warwick* of the 1st of October (which is most material, as governing the whole after-transaction) reached *Jackson, Riddle & Co.*, we admit that they were the separate creditors of *Warwick*; but when they, by their own letter of the 15th November 1836, agreed to transfer all open accounts to the new firm of *Warwick* and *Clagett*, they were bound by such agreement; and cannot now resort to the separate liability of *Warwick* alone. In *Evans v. Drummond*(a), where *A.* and *B.* gave their joint acceptance for goods furnished on their joint credit, and after a dissolution of the partnership between them, the holder and vendor took the separate bill of *A.*, as a renewal of the former bill, it was held that *B.* was discharged. [*Erskine*, C. J. All the autho-

(a) 4 Esp. 89.

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rities go to this, that if the creditor agrees to transfer the separate account to the joint one, then the joint account is substituted for the former separate account. But if there is no such agreement, then the joint account is only an additional security to the creditor.] The case of *Thompson v. Percival*(a) is another authority to the same effect; where it was held, that it was a question for the jury, whether a joint creditor of *A.* and *B.* agreed to accept *B.* as his sole debtor, and took his acceptance in satisfaction of the debt due from both. Now in this case,—besides the agreement of *Jackson, Riddle & Co.*, in their letter of the 15th November 1836, to transfer *Warwick's* separate account to the joint account of *Warwick and Clagett*, they drew bills on *Warwick and Clagett* for the amount of the advances made by *Jackson, Riddle & Co.* (by *Warwick's* order) to *A.* and *J. Warwick*. *Ex parte Nolte*(b) is also a decision in favour of the petitioners.

Mr. *Anderdon* appeared on behalf of a large separate creditor of *Warwick*.

Mr. *Burge*, and Mr. *J. Russell*, *contrâ*.—The bills drawn by *Jackson, Riddle & Co.* on *Warwick and Clagett*, not having been paid when they arrived at maturity, the original separate liability of *W. S. Warwick* revived; for a bill of exchange is no satisfaction of a debt, unless the bill is paid; and in this case the bills were drawn merely as a mode of payment, and not as adopting the liability of the new firm, to the exclusion of the individual liability of *Warwick*. It appears from the affidavits filed on behalf of the respondents, that after the

(a) 5 B. &amp; Adol. 925.

(b) 2 Y. &amp; J. 295.

partnership was formed between *Warwick* and *Clagett*, *Jackson, Riddle & Co.* kept the account of their acceptances for *A. and J. Warwick* distinct from the other account with *Warwick* and *Clagett*. There were, in fact, two accounts between the two houses, one the joint exchange account, and the other a separate account with *Warwick*; the former account was the only one transferred to the new partnership; while the separate account, which included the sums and bills on which this question arises, was never transferred. The cases cited on the other side do not apply to this. It is very different, where the joint creditor of a partnership takes the separate security of an individual partner; for the inference is much stronger there, that the creditor abandons his former security, than in the present case, in which the creditor takes the joint undertaking of a partnership, where a separate debt of one partner previously existed. There are cases much stronger than this, in favour of the extinguishment of the original debt, where Lord Chancellors have said, the original debt shall not be extinguished. Here, the separate estate of *W. S. Warwick* has had the benefit of the advances made to *A. and J. Warwick*, and now they want to throw the burden on the joint estate. If bankruptcy had not occurred, *Jackson, Riddle & Co.* would clearly have had a right of action against *Warwick*, unless the transfer of the account would amount to accord and satisfaction; and it is difficult to conceive what satisfaction could ensue from such transfer of accounts, when the bills drawn on *Warwick* and *Clagett* were never paid.

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Mr. *Swanston*, in reply, was stopped by the Court.

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ERSKINE, C. J.—The Court are unanimously of opinion, that this proof ought to be expunged. I take it for granted, that at one period there was a separate debt due from *Warwick* to *Jackson, Riddle & Co.*; because, although the actual payment of the money by *Jackson & Co.* was after the receipt of the letter of *Warwick* and *Clagett* of the 6th October, yet it was paid on account of bills accepted by *Jackson & Co.*, in pursuance of *Warwick's* letter of the 29th June 1836; the circumstances, therefore, of the payment being after the receipt of the letter of the 6th October, does not seem to be material. The debt then, being originally the separate debt of *Warwick*, would no doubt continue a separate debt, unless there was some express or implied agreement between the parties to exonerate *Warwick* as a separate debtor, and substitute the firm of *Warwick* and *Clagett*. I perfectly agree with the counsel for the respondents, that the mere circumstance of the bill being accepted by *Warwick* and *Clagett* would not, of itself, be an extinguishment of the former debt; but then the fact of *Jackson, Riddle & Co.* drawing bills on the partnership, coupled with the other circumstances of the case, does furnish evidence of an agreement on their part to substitute *Warwick* and *Clagett* as their debtors, instead of *Warwick* alone. Upon entering into partnership, *Warwick* and *Clagett*, in their several letters of the 1st and 6th October, requested *Jackson, Riddle & Co.* to consider all credits, advices, and instructions then in force from *Warwick*, as extending to the firm of *Warwick* and *Clagett*. I cannot entertain a doubt but that the proposal meant by those letters was, to transfer all accounts then depending between *Warwick*, and *Jackson & Co.*, to the joint account of *Warwick* and

*Clagett.* *Jackson & Co.* might not have agreed to this proposal, or might have agreed only in part. But what do they do? They write the letter of the 15th November in answer, saying, "we shall make up and transfer to your new firm the open accounts in joint exchange transactions, but hope to have your account current made up to our's transmitted, before we carry the old account over to your firm." It has been contended, that by the specific mention of "accounts in joint exchange transactions," *Jackson & Co.* excluded other accounts. But if such had been their intention, would it not have been expressed? If, indeed, there had been another account besides the joint exchange account in the books of *Warwick*, and *Jackson & Co.* had then specified the joint exchange account, there might have been some weight in the argument. But there is no evidence that such an account was existing. If the facts of the case had stopped here, I should say that there was strong ground for inferring, that the proposal, as well as the acceptance of it, was intended to apply to all accounts between the parties. But the subsequent conduct of *Jackson, Riddle & Co.* affords stronger ground for this conclusion; for, instead of drawing on *W. S. Warwick* alone, for the amount of their advances to *A. & J. Warwick*, in pursuance of the original instructions from *W. S. Warwick*, they drew on the new firm of *Warwick* and *Clagett*. This appears to me satisfactory evidence of their adoption of the proposal made by *Warwick*, to transfer all accounts to the new firm. Sufficient reasons also might be adduced, to lead to the conclusion, that *Warwick* would not have proposed any partial arrangement as to the transfer of accounts, but that the transfer should extend to all. For instance, a balance was due

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from *Jackson & Co.* to *Warwick*, on other transactions. Would he then have proposed, or have consented, that all balances due to him should be transferred to the credit of the new firm, and that all his separate liabilities should continue? It was but just and reasonable, that he should have the right to set off one balance against another. It is then urged, that though the credit might appear to have been transferred to *Warwick* and *Clagett*, yet that the dealings were confined to *Warwick* alone, and that *Warwick* and *Clagett* debited *Warwick* separately with the amount of these bills. But why did they do so? *Clagett* could derive no benefit from the former transactions between *Jackson & Co.*, and *Warwick*, relating to the purchase of tobacco; and therefore, as between themselves, *Warwick* was liable to *Clagett* for the amount of the bills accepted by them to reimburse *Jackson & Co.* the funds, which they had advanced to enable *A. & J. Warwick* to make such purchases. But that was a matter solely between *W. S. Warwick* and his partner *Clagett*. It appears to me, therefore, that the arrangement between the parties amounted to an agreement to substitute the joint liability of *Warwick* and *Clagett*, for the separate liability of *Warwick*; and that *Jackson, Riddle & Co.* have consequently no right of proof against the separate estate of *Warwick*.

Sir JOHN CROSS.—This is not a question of law, or equity, but a pure question of fact: viz.—whether it was intended and agreed between these parties, that the former separate accounts of *Warwick* with *Jackson, Riddle & Co.* should be transferred to the joint account of *Warwick & Clagett*. I am of opinion, that it was so agreed. The proposal of *Warwick* was, according to



my apprehension, that *all* dealings, though not in express terms, should be transferred to the joint account of the new firm. And the answer of *Jackson, Riddle & Co.* is, that they would comply with such request. They then draw bills on the new firm for advances previously made to *Warwick* alone; clearly showing, that the new firm was to be substituted for the old.

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Sir GEORGE ROSE.—The contract between these parties is to be collected from their correspondence. On the 29th June 1836, *W. S. Warwick* gives *A. & J. Warwick* a letter of credit on *Jackson, Riddle & Co.*, and writes to *Jackson & Co.* directing them to draw on him for reimbursement. After the formation of the partnership with *Clagett*, *W. S. Warwick* writes to *Jackson & Co.* on the 1st October, to inform them of that event, and begging them to “consider all credits, advances, and instructions, now in force from me, as extending to the firm of *Warwick & Clagett*.” Then, is not this letter of the 1st October, a virtual withdrawal of *Warwick*’s previous letter of the 29th June, by which *Jackson & Co.* were authorized to draw on *Warwick* alone? It is true, that *Jackson & Co.* might have refused to accede to the proposal contained in the letter of the 1st October; but the contrary is the fact; for they do not merely not act on the letter of the 29th June, but they expressly act on the letter of the 1st October, by drawing on the new firm of *Warwick & Clagett*, instead of on *Warwick* alone, pursuant to the original instructions. I admit it is a principle of law, that when a party takes a bill of exchange for an existing debt, and the bill is not paid when due, the debt will revive. But how can that doctrine apply to this

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case, where the debt has been transferred from the separate account of *Warwick* to the joint account of *Warwick & Clagett*? The joint liability has extinguished the separate liability, independently of the bill; and therefore the mere non-payment of the bill, when due, could not revive the separate liability of *Warwick*. Some delusion appears to have existed in this matter, as to considering it a question of election; and it seems to have been so treated before the Commissioner. But it is not a question of election at all; the only question is, whether the joint liability of *Warwick & Clagett* has not been agreed to be substituted for the previous separate liability of *Warwick*. Now, in what measure have *Jackson, Riddle & Co.* shown any intention to resort to the separate liability of *Warwick*? When the bills fell due before the bankruptcy, and were not paid, did they do so? But if they had, *Warwick* might have said, in answer, "I have purchased my exoneration from you, by giving you the joint security of the new firm." Could an Order be made by any Court, after an adoption by *Jackson, Riddle & Co.* of the mode of their reimbursement by the joint security of *Warwick & Clagett*, to permit them now to resort to the separate liability of *Warwick*?

The ORDER was, that the proof against the separate estate should be expunged, and that the petitioners should take their costs out of the separate estate, and the respondents have their's out of the joint estate.

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Ex parte RICHARDSON.—In the matter of WARWICK  
and CLAGETT.

THIS was a petition, that the Commissioner might be directed to receive the petitioner's proof for the sum of 3200*l.* against the separate estate of *Warwick*, in pursuance of a former Order of the Court for that purpose. It appeared, that the Commissioner refused to receive the proof, unless there was a private meeting of creditors called to consider the amount and nature of the petitioner's debt, and the justice of his claim against the estate.

*Gray's Inn Hall,*  
*July 12, 1838.*

When the Court makes an Order, that a creditor shall be permitted to prove for a certain sum, the Commissioner cannot decline to receive the proof, until a private meeting has been called to inquire into the nature of the debt.

Mr. *Anderdon* appeared in support of the petition.

Mr. *Swanston*, *contra*. The Commissioner thought he was not bound to admit the proof, without any inquiry; but merely to admit the petitioner to prove or claim such debt, as he might be able to substantiate.

The COURT made an Order, that the Commissioner should receive the proof.

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IN this case, a power of attorney had been given by several creditors residing abroad, to a party in England, to sign their consent to the annulling of the fiat; but the Registrar doubted whether there ought not to be a separate power of attorney from each of the creditors, to justify him in issuing the Order to annul.

*Gray's Inn Hall,*  
*July 16, 1838.*

One power of attorney, from several creditors, is sufficient to authorize a party to sign a consent on their respective behalfs, to annul the fiat.

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Mr. *Swanston* now applied, that the Registrar might be directed to receive the consent of the party, to whom the power of attorney was given, as the consent of all the creditors, who had executed the power of attorney.

ERSKINE, C. J.—The only question would have been formerly, whether there ought not to be separate stamps on the power of attorney, according to the number of creditors executing it. But as no stamp whatever is now necessary, one power of attorney is sufficient.



Ex parte JOHN WILLIAMS and others, on behalf of themselves and all other the unsatisfied Creditors of WILLIAM WYNNE, deceased.—In the matter of JAMES KNIGHT and SAMUEL KNIGHT.

Westminster,  
Nov. 5, 1838.

The Court of Review has no jurisdiction to order a fund in Court to be distributed amongst the creditors of a testator, to whose estate the fund belonged; the proper proceeding being by bill in equity for the distribution of assets; but the Court made a special order for the transfer of the fund to the Accountant-General of the Court of Chancery, as soon as a bill should be filed by the creditors.

THE bankrupt, *James Knight*, had been appointed sole executor of *William Wynne*, deceased; and this was the petition of the creditors of the testator, that a certain fund, which had been paid into the bank under a former Order of this Court, might be apportioned amongst them.

A commission of bankrupt was issued against *James* and *Samuel Knight*, on the 1st December 1831.

*William Wynne*, at the time of his death, being indebted to various persons by specialty and simple contract, by his last will, dated the 8th March 1820, appointed the bankrupt, *James Knight*, who was his son-in-law, his executor; and died on the 12th August 1820. The bankrupts were bankers at Mold, in Flint-

shire, and were indebted to *William Wynne*, at the time of his death, in 3000*l.*, which *James Knight*, as his sole personal representative, was the only legal hand to receive.

By an Order of this Court, made on the 5th July 1833, on the petition of the present petitioners, it was ordered that *James Knight* should be at liberty to make such proof as he could establish against the joint estate of the bankrupts, and the separate estate of *James Knight*, in respect of the debts due to the petitioners, from the estate of the testator; and that the dividends on such proof should be paid into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to an account, to be entitled, "The Account of unsatisfied Creditors of the Testator, *William Wynne*, deceased;" and that the costs of all parties occasioned by that application should be paid out of the estate of the bankrupts. By virtue of this Order, *James Knight* proved against the bankrupts, debts to a large amount; the dividends on which proof amounted to 3081*l.* 16*s.* 6*d.* From this sum, *James Knight* deducted the sum of 1000*l.*, which he stated to have been expended by him as the executor of *William Wynne*, and the residue, viz., 2081*l.* 16*s.* 6*d.*, was paid by the assignees into the bank in the name of the Accountant in Bankruptcy.

The prayer was, that the costs of all parties occasioned by the former application, as well as by the present one, might be taxed, and, when taxed, might be paid to the assignees out of the bankrupt's estate; that it might be referred to the Registrar, to take an account of what was due to the petitioners respectively, in respect of their several debts, and to apportion the sum of 2081*l.* 16*s.* 6*d.*

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amongst the petitioners, according to the amount which the Registrar should find to be due to them; and that the Accountant in Bankruptcy might be directed to divide the sum of 2081*l.* 16*s.* 6*d.* amongst the petitioners, pursuant to such apportionment; or that the Accountant in Bankruptcy might be directed to pay the said sum to *James Knight*, as the personal representative of the testator *William Wynne*, upon his giving security duly to administer and divide the same amongst the creditors of the testator.

*Mr. Stinton* appeared in support of the petition.

The COURT thought there was no jurisdiction in bankruptcy to order the funds of a testator to be divided amongst his creditors, but that they must file a bill in the Court of Chancery for that purpose; and accordingly made the following

ORDER: that the costs of the former Order should be paid by the assignees out of the bankrupt's estate, pursuant to the terms of that Order; that when a bill should have been filed in the Court of Chancery for distribution of the fund, the sum in question should be paid by the Accountant of this Court to the Accountant-General of the Court of Chancery, in trust in that cause; and that the costs of the present application should be paid by the petitioners out of the fund.



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In the matter of GREGG.

MR. *ANDERDON* applied for an Order, that a town fiat might be issued in this case, instead of a country fiat, on the ground that twenty-eight out of the thirty creditors of the bankrupt resided in London. The bankrupt himself resided at Gosport, and the London debts amounted to £700*l*.

The COURT made the Order as prayed, the petitioning creditor undertaking personally to pay the bankrupt's extra expenses of attending in London.

Mr. *Anderdon* brought the matter on this day before the Lord Chancellor, by way of appeal motion, from so much of the Order as directed the petitioning creditor personally to pay the costs, when

Lord COTTENHAM, C., directed the Order to be varied, by adding, that the petitioning creditor should be at liberty to recoup himself out of the estate.

*Westminster,*  
Nov. 5, 1838.

A town fiat was ordered to be issued, instead of a country fiat, on the ground that twenty-eight out of thirty creditors resided in London; and the petitioning creditor was permitted to recoup himself the additional expenses of the bankrupt's attendance out of the estate.

Nov. 8,  
*Coram*  
Ld. Chancellor.

Ex parte EVANS.—In the matter of EVANS.

Ex parte ELLIS.—In the matter of EVANS.

THESE were petitions to revive an Order made in these matters, in January 1833, which directed inquiries as to certain arrangements made between the present assignees, and the former assignees, who were discharged by an order of the Court.

*Westminster,*  
Nov. 6, 1838.

A petition to revive a former Order is of course, unless some hardship can be shown from such revival.

Mr. *Bethell* appeared in support of the first petition.

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Mr. *J. Russell*, for the second petition.

Mr. *Swanston*, *contrà*, contended, that the Order could not now be prosecuted, after so great a lapse of time.

ERSKINE, C. J.—Ought you not to have come to the Court, to compel them to prosecute, or abandon, the Order? A petition to revive a former Order is a matter of course, unless some hardship can be shown from the Court doing so,—as in the case of a party losing evidence by reason of the delay.

Sir JOHN CROSS concurred.

Sir GEORGE ROSE concurred.

Ordered as prayed.

Ex parte THOMAS MAY.—In the matter of JOSEPH  
MALACHY.

Westminster,  
Nov. 7, 1838.

A petition to stay the bankrupt's certificate alleged, that the assignees procured

THIS was the petition of a creditor, to stay the bankrupt's certificate, under the following circumstances:

In January 1836, the petitioner entered into partner-

a proof to be expunged, which ought to have remained on the proceedings, and permitted other proofs to remain, which ought to have been expunged, without stating that the debt expunged would have turned the certificate, or that the bankrupt was a party to the proceeding:—*Held*, not sufficient grounds to stay the certificate.

The petitioner also alleged, that if an account was taken between him and the bankrupt, a very large balance would be due to the petitioner, without stating the probable amount of such balance:—*Held*, also, that this was a defective allegation, on a petition to stay the certificate.

If the petitioner seeks to prove, as well as stay the certificate,—or if the petition imputes any improper conduct against the assignees,—the petition ought to be served on the assignees.

Where *A. B. & C.* are partners, and *B.* becomes bankrupt, and *A.* petitions for an account to be taken between himself and *B.*; *semble*, that *C.* ought to be served with the petition; and that *A.* cannot prove under the fiat against *B.*, without showing that all the partnership debts have been paid.



ship with the bankrupt and one *Henry Gilbard*, as lime burners and coal and iron merchants ; but the partnership was dissolved by mutual consent, on the 26th December 1836, though the partnership accounts were not then, nor had been since, adjusted. Upon the dissolution of the partnership, the stock in trade and effects, and books of account, remained in the possession of the bankrupt, upon his promise to account for the same, and make up the partnership accounts ; but the petitioner alleged, that he had never done so, nor accounted with the petitioner or *Gilbard* for the partnership effects ; and that the partnership books had been since taken possession of by the assignees, or their solicitor, to whom the petitioner had made repeated applications for them without effect. The petition stated, that since the bankruptcy of *Malachy*, which occurred on the 10th February 1838, the petitioner and *Gilbard* had been sued for and paid large sums of money, on account of the partnership ; by reason of which, and prior advances made by the petitioner, the partnership was largely indebted to him. The petitioner had also divers mining speculations with the bankrupt, on which he claimed a balance of 585*l.* 11*s.* 6*d.* to be due from the bankrupt, on an account settled between them. After the settlement of this balance, the petitioner had various bill transactions with the bankrupt, on which he claimed a balance of 2224*l.* 13*s.* Various bills of exchange, on which the petitioner was liable as drawer or indorser, had been proved by the respective holders of them, under the fiat, and had been since paid, in full, by the petitioner. The petitioner alleged, that the assignees convened a private meeting of the Commissioners on the 11th September last, of which the petitioner had no

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knowledge, for the purpose of expunging a proof for 1200*l.* on one of the above-mentioned bills, made by *Harris & Co.*, who had refused to sign the bankrupt's certificate; and that immediately afterwards, they held another private meeting, and signed the bankrupt's certificate. That by not expunging the proofs of other creditors, who had been paid in full, or in part, and by the inability of the petitioner to prove the amount of the balance owing him by the bankrupt, the consent of three-fifths in number and value of the creditors was obtained to the bankrupt's certificate.

The prayer was, that the allowance and confirmation of the certificate might be stayed; that the assignees might deliver to the petitioner particulars of the account claimed by them from the petitioner; that a balance might be struck, in order that the petitioner might prove his debt, and be at liberty to assent or dissent from the allowance of the certificate; that the debts, and parts of debts, proved, which had been paid before the signing of the certificate, might be expunged; and that the certificate might be sent back to the Commissioners to re-certify.

In answer, the bankrupt had made an affidavit, in which he contradicted many of the allegations in the petition, stating, that instead of the bankrupt being indebted to the petitioner, the latter was indebted to the bankrupt in a sum of 17,665*l.* 12*s.* 2*d.*; that the whole of the debt proved by *Harris & Co.*, on certain bills of exchange drawn by the petitioner upon the bankrupt, and since expunged, was on bills which were accepted by the bankrupt for the accommodation of the petitioner; and that the bankrupt was not ever indebted to the petitioner, on account of such bills; that the assignees of the bankrupt's estate had taken out a fiat in bankruptcy

against the petitioner, upon the debt alleged by the bankrupt to be so due to him from the petitioner, and intended to open and prosecute it; that the petitioner had on many occasions expressed his desire, that the bankrupt should obtain his certificate; and that it was not until the assignees applied to the petitioner for payment of the above debt alleged to be due to the bankrupt, and had threatened to take proceedings to enforce the payment of it, after an offer of reference on the part of the assignees had been refused by the petitioner,—that the petitioner showed any opposition to the bankrupt obtaining his certificate.

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Mr. *Bethell*, who appeared for the bankrupt, observed that there was no affidavit of the petition having been served on the assignees, and that they ought to have been served with a petition of this description.

Mr. *Swanston*, and Mr. *J. Russell*, in support of the petition. We claim in this case only against the bankrupt. There is nothing to prejudice the assignees. It appears, that two of the creditors, who have signed the certificate, have been paid in full, and that a third has been paid something on account. The certificate is therefore fraudulent; for two of the debts ought to have been wholly expunged, before the Commissioners signed the certificate. Then again, *Harris & Co.*'s debt was improperly, expunged. The petitioner, as the drawer of the bill, in respect of which that proof was made, was surety for the amount of the bill, and had a right to stand in the place of the creditor who had proved. He was therefore entitled to notice, before the proof was expunged; and yet no notice was given to

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him. In *Ex parte Buckner* (a), where a creditor upon a judgment to indemnify, who was not in fact damnified, had signed the bankrupt's certificate, it was held, that he was not entitled to do so; and the certificate was sent back to the Commissioners. If *Harris & Co.*'s debt had remained on the proceedings, the certificate could not pass; for there would then not have been three-fifths in value of the creditors. [*Erskine*, C. J. Can you, in the absence of the assignees, go into the question, whether you are entitled to prove under the fiat?] We are opposing the bankrupt, and no other person. We ask nothing against the assignees, nor any order to affect them. Such a rule of practice was never heard of, as that contended for on the other side, namely, that on a petition to stay the certificate, the assignees must be served with the petition. The only consequence would be, to give the assignees the costs of their appearance. The petitioner only asks for an opportunity of going before the Commissioners, and making such proof as he is able. A creditor of the name of *Hawtayne* had proved on a bill for 317*l.*, accepted by the bankrupt, and drawn by the petitioner, which was afterwards paid in full by the petitioner; notwithstanding which, this creditor signed the bankrupt's certificate. Another reason for staying the certificate is, that the partnership accounts between the bankrupt and the petitioner have not yet been taken; *Ex parte Hadley* (b). [*Erskine*, C. J. There seems to be no evidence, or even any charge here, that the bankrupt has been instrumental, or a defaulting party, in preventing the accounts from being settled;—that was the main ground of the decision of the Court in *Ex parte*

(a) 1 C. B. L. 462.

(b) 1 G. & J. 193.

Hadley.] The material point in our case is, that there is no delay in us, and an unsettled account; which fully justifies the petitioner in asking the Court to stay the certificate, until the account can be taken; otherwise, the bankruptcy of a man would screen him in all cases from any liability on an unsettled account; which would be productive of gross injustice. This fiat issued in February last, and up to that time numerous applications were made to the bankrupt for a settlement, without effect. [*Erskine*, C. J. Applications made *before* the bankruptcy are not sufficient grounds for staying the certificate.] In the present case, however, we submit there is quite sufficient reason for staying the certificate, until the accounts be taken; for the books and accounts are in the possession of the bankrupt, and the petitioner cannot get access to them. The bankrupt admits in his own affidavit, that a balance of 598*l.* is due from him to the petitioner; but we say, that there is 2000*l.* and upwards due to the petitioner. The case we present to the Court is not like that of *Ex parte Johnson* (a), where the demand of the creditor opposing the certificate depended on an account to be taken, and he would not swear to a balance in his favour. We swear here, that the balance is in our favour. [Sir *George Rose*. Here is an application to take a partnership account, and one of the partners, *Gilbard*, is not before the Court.] Cannot one partner have an account against his copartner, without bringing a third partner before the Court? If the petitioner's statement is correct, it is clear that the bankrupt has not made a full and complete discovery of his effects, and that the assignees are not creditors of the bankrupt. More-

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(a) 1 Atk. 81.

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over, the certificate does not state the day of the bankrupt's last examination; which is a material defect.

Mr. *Bethell*, and Mr. *Bacon*, for the bankrupt. A petition by a creditor who has not proved, to stay a bankrupt's certificate, must show, positively, that a debt is due from the bankrupt,—that an application to prove has been made and refused,—and that due diligence has been used by the petitioner. Here, all these ingredients in the case are wanting. There have been no less than six public meetings of the Commissioners; and the petitioner ought therefore, at one of them, to have gone before the Commissioners, and have tendered proof of the balance he claims. The petitioner ought also to shew, that the amount of his debt would turn the certificate. But, as he founds his claim to stay the certificate, on the alleged ground that he is a creditor, he cannot substantiate his right to be considered a creditor, in the absence of the assignees; and he has shown no reason whatever to the Court, why the assignees have not been served with this petition. There is, also, no allegation in the petition, of any default on the part of the bankrupt, that justifies the staying of his certificate.

Mr. *Swanston*, in reply. There has been no denial on the part of the bankrupt, of there being an unsettled account depending between him and the petitioner; and that, of itself, is a sufficient cause for staying the certificate. The petitioner alleges, that the bankrupt is indebted to him on account of the partnership, in addition to the 2000*l*. As to the objection of his not tendering a proof before the Commissioners, how could he

make a claim on an unsettled account? [*Erskine*, C. J. According to your statement in the petition, you have done nothing but ask the assignees to deliver up the partnership books.] Because we could not make out the accounts, without the possession of the books. If there was any such imperative rule, as that a party could not petition to stay the bankrupt's certificate, unless he had tendered a proof of his debt before the Commissioners, it would have been urged in the case of *Ex parte Whitchurch* (a), but nothing of the kind appears there. When that case came before Lord *Eldon*, he directed a search should be made at the Bankrupt Office for precedents of certificates being stayed on the application of mortgagees, whose debt had not been ascertained; and three precedents were produced. Lord *Eldon*, indeed, did not make the order for staying the certificate, as the amount of the balance was disputed; but he directed the certificate to be deposited in the Bankrupt Office, subject to his order, and the mortgage account to be taken.

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ERSKINE, C. J.—It appears to me, that the petitioner has established no valid ground for staying the bankrupt's certificate. The first ground he has alleged is, that on taking the partnership accounts there will be a large balance due to the petitioner. The second ground is, that the certificate is signed by certain persons, whose debts ought to be expunged. And the third ground he has stated is, that another debt had been expunged, which ought still to have stood on the proceedings. But, as to the two last grounds, he does not state that either of them, or both together, would turn the bankrupt's

(a) 1 G. & J. 71.

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certificate. And though he alleges, that the signatures of the Commissioners to the certificate were obtained through these improper acts, yet he does not say that the bankrupt has been a party to them; and notwithstanding he charges these acts on the assignees, yet he has not served them with the petition. Now, a party, who is charged with a fraud, ought to have an opportunity of answering the allegation, and to be examined before the Court. It is clear, therefore, that the certificate ought not to be stayed on either of the two last grounds. Then, as to the first ground, of there being a large balance due to the petitioner; this is disputed by the bankrupt, who swears positively, that there will be a large balance the other way. Besides, a party coming to stay a certificate, on the ground of an unsettled and disputed account, must show that he has taken early steps to settle the account, or that the bankrupt had prevented such settlement by his own conduct. In *Ex parte Hadley (a)*, the petitioner had been active in urging a settlement of the account, and the bankrupt had prevented the settlement from taking place. Here, there is no evidence, that the petitioner ever took one single step to settle the accounts—he has not gone before the Commissioner to enter a claim for any alleged balance, nor has he demanded an account from the assignees;—all that he says on this subject is, that he has demanded the bankrupt's books. He has stated no reason why he has not demanded an account of the assignees, or gone before the Commissioner to assert his claim; and as he has taken no steps whatever to procure a settlement of the accounts, he has made out no case for staying the bankrupt's certificate.

(a) 1 G. & J. 193.

Sir JOHN CROSS.—The only question is, in this case, whether, in the exercise of a sound discretion by the Court, the certificate, under all the circumstances, ought not to be stayed. A great deal of discussion has taken place on the point, whether the assignees should not have been served with this petition. It appears, however, that in one of the cases which have been cited, the assignees were not served with the petition; and there were no objections taken on this ground. But this, after all, seems to be a mere technical objection; and whether served or not, they come here voluntarily to make affidavits, and are consequently before the Court as deponents, if not as respondents. Then the question comes to this—are we bound to allow this certificate? What are the facts? The fiat issued against the bankrupt in February, in this year. If the petitioner's statement is true, his debt will amount to more than the debts of the creditors who have signed the certificate. Not a farthing of dividend has been paid. The petitioner alleges, that he has made frequent applications to the bankrupt for a settlement of the accounts, without effect; and that he has also applied for the partnership books, without effect. If the assignees decline giving them up to the petitioner, why did they not say, that he might inspect them? But, instead of rendering any account, or permitting the inspection of the books, they take proceedings against the petitioner in a hostile way, and claim to be large creditors. Was it not then quite useless for the petitioner to attempt to make any proof under the fiat? The assignees seem to be making common cause with the bankrupt, and have with unusual promptness signed the bankrupt's certificate. I observe, that all the creditors but two, whose names appear to the certificate, signed

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it in May last. These were not quite enough in number and value; and therefore Mr. *Husband*, the solicitor of the bankrupt, waits till October to get two other creditors, whose debts are of small amount, to add their signatures as make-weights to carry the certificate; and then the assignees procure the Commissioners to expunge a proof on a bill for 1200*L.*, which the petitioner had paid as drawer; but they omit to expunge any portion of Mr. *Hawtayne's* debt, the half of which had also been paid by the petitioner. It is perfectly clear, therefore, that *Hawtayne*, who is one of the assignees, must have been fully aware that his own proof ought to have been reduced; and yet he signs the certificate for the full amount of the debt which he originally proved. This shows the spirit, in which the assignees have tried to aid the bankrupt, and defeat the petitioner. It seems to me, therefore, that we ought to pause in this stage of the proceeding, and have an examination of the accounts, before we allow this certificate. The assignees do not say, that they have taken an account, but that the bankrupt has taken an account. If so, where is it? No evidence of such account has been adduced. I think we should be hasty and precipitate to allow the certificate, before any inquiry into the state of the partnership accounts. The petitioner swears, that a balance of 2000*L.* and upwards is due to him. But, however that may be, it is admitted that the petitioner has paid a debt of 1200*L.*, for which he was security, which debt had been proved by a creditor, who had refused to sign the certificate; and which debt the assignees procured to be expunged, when the petitioner ought to have stood in the place of that creditor. Looking at all these circumstances, and considering, too, that there has been no dividend yet

declared of the bankrupt's estate, I think we ought not yet to allow the certificate. There is another circumstance, also, which is material to be considered; it does not appear from the certificate but that it was signed before the bankrupt passed his last examination. If so, that is, of itself, a sufficient ground for pausing before we allow the certificate.

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Sir GEORGE ROSE.—There is no plainer rule than this in proceedings in bankruptcy, that nothing is to be taken against the bankrupt, on a petition to stay the certificate, except upon express statements contained in the petition; and, as far as my experience goes, the Court has always been strict in enforcing that rule. The bankrupt is not obliged to come as an applicant to this Court, in order to obtain his certificate,—he obtains it of course, if it is signed by the Commissioners and the proper number of creditors; and any application to the Court on the subject is left to others, who resist the certificate. It is, in my opinion, a good rule, that the bankrupt should on such an occasion meet with indulgence. According to the former practice in bankruptcy, upon a petition to prove a debt and stay the certificate, if the assignees were not served, the petition would have been dismissed; or, if the bankrupt had come and stated that fact, he would have been entitled to have his certificate allowed. Then, with respect to the allegation of fraud,—where a party comes in the colourable or doubtful character of a creditor, and imputes fraud to the assignees, or the bankrupt, the Court ought to examine the case strictly. Now, let us see what that fraud is. The petitioner alleges, that, on the 11th September last, the assignees convened a private meeting of the Commissioners, of which the

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petitioner had no knowledge whatever, for the purpose of expunging the proof of debt made by Messrs. *Harris & Co.*, who had refused to concur with the other creditors in signing the bankrupt's certificate; and immediately afterwards held another private meeting, and signed the certificate. Now, nothing whatever appears in this allegation, that the bankrupt was a party to the imputed fraud. But, even supposing the bankrupt was present at this meeting, and was a party to the expunging of this debt, have not the assignees a right, I would ask, to expunge a proof, when the debt is paid in full? But taking it, for a moment, that there was some suspicion of fraud in the transaction, what ought this Court to do, in that way of putting it? Why, to give the bankrupt his certificate—for if it has been accomplished by fraud, the certificate is bad at law, and is not worth one farthing. This has been the constant habit of the Court, unless the fraud was as clear as day-light. Suppose I am the drawer of a bill of exchange, which is proved by the holder under a fiat against the other party to the bill, and which I afterwards pay as surety—there is no doubt but that I have a right to the benefit of the proof, and to stand in the place of the original creditor. It may be a question, however, whether this includes a right to stay the bankrupt's certificate; but I do not say at present how that would be. Here the petitioner states, in general terms, that on the balance of an unsettled account between him and the bankrupt, he could turn the certificate; but he should have sworn to the *amount* of this alleged balance, in order that the Court might see whether it would turn the certificate. Now, as the bankrupt has sworn it would not do so, that is enough to entitle him to have his certificate allowed, in the

absence of all proof of the amount of the balance alleged to be due to the petitioner. Then, as to taking the partnership accounts between the bankrupt and the petitioner, the bankrupt might say, in opposition to any petition to take such account, that there was a third partner, *Gilbard*, who ought to be a party to any such inquiry, and who was not before the Court. There is also another objection that might be urged against any right of proof on the part of this petitioner, and that is,—there is no allegation here, that all the partnership debts have been paid. Now it would be preposterous to say, for one moment, that the petitioner could, under these circumstances, be admitted as a creditor against the bankrupt's estate. Part of his case is, too, that some of the very debts, from which he ought to have indemnified the bankrupt, he allowed to be proved against his estate. It appears, moreover, that a docket has been struck against this petitioner; and though the fiat has not yet been opened, yet that amounts to such a charge of insolvency against him, as would induce this Court to lean against any petition presented by him to stay this bankrupt's certificate.

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Petition dismissed, with costs.

Ex parte BUTTERWORTH.—In the matter of BUTTERWORTH.

THIS was a petition of the bankrupt, to annul the fiat, under the 133rd section of the 6 Geo. 4. c. 16.; which provides, that if nine-tenths in number and value of the bankrupt's creditors, assembled at any meeting held pur-

Westminster,
Nov. 9, 1838.
The certificate of the Commissioners, under the composition contract clause, need not state that no creditor to the amount of 50*l.* resided out of England.

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suant to the directions of the act, shall agree to accept a composition, the commission may be superseded.

Mr. *Swanston*, in support of the petition, said, that there was a difficulty in drawing up the Order at the Bankrupt Office, as the certificate of the Commissioners had not certified that no creditor to the amount of 50*l.* was without the jurisdiction of the Court. There was, however, an affidavit of that fact. And there is nothing in the General Order (a) relating to this subject, which requires the Commissioners to introduce such an allegation in the certificate. There was another objection made at the office, that there was no proof of the consent of the assignees. But this also does not appear to be required by the terms of the General Order.

ERSKINE, C. J.—Take an order for annulling the fiat, on producing the proceedings at the office, to show who are the assignees.

(a) See Lord *Eldon's* General Order, 27th June 1826, 2 G. & J. xv.; 2 Deac. B. L. 104. All that the act directs on this head is, that any creditor to the amount of 50*l.*, residing out of England, shall be personally served with a copy of the notice of the meeting to decide upon the offer of composition.

Ex parte THOMAS SWINBURNE.—In the matter of
HENRY FIELD and JAMES CRANE.

Westminster,
Nov. 13, 1838.

The petitioner
struck a docket
against the
bankrupt,

THIS was a petition to stay a dividend, under the following circumstances:

which he afterwards abandoned, and entered into an arrangement, by which the bankrupt assigned all his property to the petitioner, in trust for himself and the other creditors. After the petitioner had taken possession of the bankrupts' property, and incurred some expense in the execution of the trusts, another creditor sued out a fiat against the bankrupts, under which the assignees seized the bankrupts' property in the hands of the petitioner.—*Held*, that the petitioner had no lien on the property, as against the assignees; the docket struck by him being *prima facie* evidence of his having notice of an act of bankruptcy prior to the trust assignment, and the assignment itself amounting to an act of bankruptcy.

In December 1836 the petitioner struck a docket against the bankrupts, which, however, was not followed up by a fiat; the bankrupts having, shortly afterwards, called a meeting of their creditors, who agreed to accept a composition of 5s. in the pound, and requested the petitioner to concur in this arrangement; to which the petitioner consented, on the understanding that he was to be reimbursed the expenses of striking the docket, which amounted to the sum of 17*l*. In pursuance of this arrangement, an agreement in writing was entered into between the bankrupts and their creditors, bearing date the 20th January 1837, by which they agreed to release them from their debts, on payment of the composition of 5s. in the pound; and the bankrupts agreed to execute an assignment of all their estate and effects to the petitioner and one *John Godefry*, as trustees for themselves and the other creditors, for securing the payment of the composition. Before the signature of the bankrupt, *James Crane*, was obtained to this agreement, he was taken in execution by a creditor for 160*l*., who refused to accept the terms offered by the bankrupts; upon which he refused to sign the agreement, unless his release from custody was procured by satisfaction of the creditor's demand. In consequence of this determination of the bankrupt, *Crane*, the petitioner was induced to compound the demand of the hostile creditor for 40*l*., which sum the petitioner paid out of his own pocket, and thereby procured *Crane*'s discharge, and his execution of the agreement. The petitioner alleged, that he was a creditor of the bankrupts to the amount of 416*l*. 12*s*. 2*d*.; and that, shortly after the execution of the agreement, the house in which the business of the bankrupts had been carried on, with the fixtures, stock

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in trade, and utensils, were delivered up to the petitioner and *Godefry*, as trustees under the above-mentioned agreement; but that *Godefry* soon afterwards absconded, whereupon the petitioner became the sole acting trustee. In that character he sold part of the bankrupts' stock, upon credit, for about 200*l.*, and realized upon other parts about 212*l.* in cash; but the petitioner stated, that he was unable to speak with accuracy as to the amount, in consequence of the books of account having been seized by the messenger under the fiat. The petitioner alleged, that he had necessarily paid and disbursed, in execution of the trusts, for rent, taxes, wages, and other expenses, the sum of 280*l.*, and had subjected himself to law expenses for preparing the aforesaid agreement, and an assignment in pursuance thereof, to the further sum of 50*l.*; that there was a balance then due to the petitioner, in respect of such advances, liabilities, and costs, in relation to the aforesaid docket, of 120*l.*; for which balance he claimed a lien on the whole of the bankrupts' property delivered up to him, and contended, that, as against all the creditors who were parties to the agreement, he was entitled to be repaid in full, and indemnified against all such advances, out of the general estate of the bankrupts. The petitioner then alleged, that he was desirous that another trustee should be associated with him in the trusts, and applied for this purpose to Mr. *Simmons*, another creditor of the bankrupts, who recommended a Mr. *Wilkins*, a confidential clerk of Mr. *Simmons*; to which the petitioner assented; and Mr. *Simmons* then instructed the solicitor, who was employed to prepare the deed of trust, to insert the name of Mr. *Wilkins* therein as trustee jointly with the petitioner. Mr. *Sim-*

mons, however, on the 15th June 1837, thought proper to strike a docket against the bankrupts, and sued out the present fiat, under which himself and his clerk, Mr. *Wilkins*, were chosen assignees; and all the property of the bankrupts then remaining in the custody of the petitioner, as trustee, together with the books of account relating thereto, were seized by the messenger. The petitioner attended the two first public meetings before the Commissioners, and claimed a lien on the bankrupts' property for the balance of 120*l.*; and afterwards, at a dividend meeting, on the 14th August 1838, renewed his claim of lien, and expressed a wish also to prove for the sum of 416*l.* 12*s.* 2*d.*; when, on being informed that the bankrupts' estate had a set-off against his demand, he pressed for an immediate settlement of accounts, and that in the meantime the payment of the dividends might be postponed; but this request was not acceded to. The total amount of funds in the hands of the official assignee, for the purposes of the dividend, were 160*l.*,—and the petitioner alleged, that all the subsequent assets that would be realized of the bankrupts' estate, would not be sufficient to pay the petitioner's lien on the property.

The prayer was, that the assignees might be restrained from paying the dividend already declared, until the question of the petitioner's lien and claim upon the bankrupts' estate was determined; that an account might be taken of all sums paid, and liabilities incurred by the petitioner, in relation to the first-mentioned docket, and to the carrying the trusts of the agreement into effect; that it might be declared, that, as against all the creditors of the bankrupts who had executed the agreement, the petitioner was entitled to have all such sums and lia-

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bilities repaid to him, in full, out of the estate of the bankrupts, and that the official assignee might be ordered to repay him such sums accordingly; that an account might be taken of the amount of the petitioner's debt contracted prior to the date of the agreement; and that he might be at liberty to prove for the amount.

Mr. *Swanston*, and Mr. *Bacon*, appeared in support of the petition.

ERSKINE; C. J.—Is there enough on the face of this petition, even taking all the statements in it to be proved, to justify the Court in giving you the Order you ask. It is not alleged in the petition, that any proof was tendered for the 416*l*. Then, as to your claim of lien,—if your assignment of the property was valid, you had a lien upon it, no doubt, for your payments, and would have a right of action against the assignees for seizing it. But, having struck a docket before the assignment, that is *prima facie* evidence of your knowledge of the act of bankruptcy. How can you, therefore, have any lien upon the property, which you alleged was seized by the assignees?

Mr. *Swanston*, and Mr. *Bacon*. If the petitioner should be wrong on the point of lien, the Court will, it is submitted, give him leave to go in under the fiat, and prove for the amount of his debt contracted before the assignment. The petitioner, when before the Commissioners, expressed a wish to prove for the 416*l*., or that an account should be taken of the real amount of his debt. This is tantamount to tendering a proof.

ERSKINE, C. J.—It seems to me, that the Commissioners and assignees have acted with the greatest liberality towards this gentleman. It appears, that he had partially administered the bankrupts' property under the trust agreement, on the supposition that he was duly administering it. If he had a legal right to the possession of the property, he would, of course, have a lien for his payments and advances. But, in the statement of the petitioner's own case, he struck a docket against the bankrupts before the date of the trust agreement. Now, a docket is always accompanied by an affidavit of the party striking the docket, that he believes the person against whom it is struck has committed an act of bankruptcy. I do not say, that such an affidavit would be a complete estoppel against the present petitioner, if he acted upon a mistake in stating his belief. But that cannot be the case, for he says; in his petition, that the only reason why the docket was not acted upon, was an intended arrangement between the bankrupts and their creditors. It appears that the Commissioners did not reject the proof, when the petitioner expressed a wish to prove it, but that they merely determined that the proof should stand over to take the account; and that the assignees said, on that occasion, that they would allow the petitioner any thing he had paid under the trust agreement. Besides, it appears from the affidavits in answer to the petition, that the Commissioners only ordered the sum of 127*l.* to be divided among the creditors, leaving a sufficient balance in the hands of the assignees to pay the petitioner a dividend of 9*d.* in the pound upon the amount of his debt. This was quite enough to put the petitioner on an equal footing with the rest of the creditors. I do not see, that the peti-

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tioner has any claim at law, or in equity, to interfere with the distribution of the bankrupts' estate.

Sir JOHN CROSS.—It does not seem to me, that there is any evidence of a rejection of the proof tendered by the Commissioners. That brings the question, therefore, to this—was there, or not, a prior act of bankruptcy to the agreement of the bankrupts to assign their property in trust for their creditors? It appears that the petitioner, in December 1836, struck a docket against the bankrupts. Now, although I am not aware of any case that goes so far as to determine, that an affidavit of a creditor who strikes a docket against a trader, in which he swears, “that he is informed, and believes, that the party has committed an act of bankruptcy,” is positive evidence of actual knowledge of such act of bankruptcy by the creditor; yet is not the affidavit *prima facie* evidence, against the party making it, of his knowledge of the commission of an act of bankruptcy by the trader; and does it not shift the burden of proof from the shoulders of the assignees to the shoulders of the party making such an affidavit? I am of opinion that it does, and that the petitioner must, therefore, be presumed to have had notice, at the date of the trust agreement, that the bankrupts had previously committed an act of bankruptcy. Besides, the petitioner admits by the prayer of his petition, that the property in the hands of the assignees under the fiat is available for the purposes of a dividend among the creditors under the fiat.

Sir GEORGE ROSE.—I am glad we are all unanimous, on the subject of this petition. There appears to me quite sufficient on the face of this petition to justify us

in saying, that the petitioner has no right to the order he asks. If the question depended merely on the petitioner having notice of an act of bankruptcy committed by the bankrupts, the affidavit he swore, when he struck the docket, is *prima facie* evidence of such notice. But the composition agreement itself, followed by the transfer of all the bankrupts' property, amounts, without any thing more, to an act of bankruptcy. And even supposing that there was no act of bankruptcy prior to this transfer of the bankrupts' property, what right would the trustees under the composition agreement have against the assignees under a fiat in bankruptcy? The petitioner comes into this Court, by virtue of a trust agreement, not only affected by an act of bankruptcy, but actually *created* by an act of bankruptcy. Then, can the trustees come to this Court, or any Court of Equity, and say that the assignees have no right to administer the effects of the bankrupts under this fiat? Would the trustees be entitled, on a petition against them for the delivery up of the bankrupts' effects, to any thing more than an account, and all just allowances in taking such account. The assignees appear to me to have acted very fairly towards the petitioner; for they did not oppose his proof, but merely said, we have a set-off against your claim.

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Petition dismissed, with costs.

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Nov. 13, 1838.

Where a petition is ordered to stand over, because the counsel is not prepared with an affidavit of service, the Court will not allow it to keep its place in the paper, if the counsel in the next petition objects.

Ex parte CROSSLEY.—In the matter of CROSSLEY.

Ex parte HALL.—In the matter of HALL.

THESE two petitions stood in the above order in the paper of the day, *Ex parte Hall* being the last in the paper. When the first was called on, the respondent did not appear; but Mr. *Swanston*, in support of the petition, not being prepared with an affidavit of service, no order could be made on it, and it was therefore directed to stand over.

Mr. *Swanston* applied for permission that it should keep its place in the paper.

Mr. *Anderdon*, who appeared in support of the petition of *Ex parte Hall*, objected to the application, as Mr. *Swanston* was not provided with an affidavit of service.

The COURT was of opinion, that in strictness, the petitioner being in default, the petition should be struck out of the paper; but that if an indulgence was granted to the petitioner, by allowing his petition to stand over, it ought not to take precedence of the next petition; for *Ex parte Hall*, being the last petition in the paper, was privileged, and the petitioner, in that petition, therefore was in no default.



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Ex parte GEORGE HALL.—In the matter of GEORGE HALL.

Westminster,
Nov. 20 & 26,
1838.

THIS was the petition of the bankrupt, to annul the fiat, on the ground of there being no valid act of bankruptcy, and no good petitioning creditor's debt. The following were the facts:—

In January 1834, a Joint Stock Banking Company was established at Manchester, and other places, under the name of "The Northern and Central Bank of England," pursuant to the provisions of the 7 Geo. 4. c. 46., of which the bankrupt was elected one of the directors, as well as one of the public registered officers and trustees. The bankrupt had been originally in business as a

A Joint Stock Banking Company, during the pendency of a suit in equity against one of its members for enforcing certain securities against him, and for an account, proceed against him under the 1 & 2 Vict. c. 110. s. 8. (the Act for the Abolition of Arrest on Mesne Process,) for the purpose of making him a bankrupt, their

public officer swearing to a debt of 15,000*l.* being due from him, although 9000*l.* of the debt is in dispute; they proceed to adjudication, and obtain from the Commissioners a provisional assignment to themselves; no other creditors appearing to prove, and no assignees being chosen under the fiat. The bankrupt having petitioned to annul the fiat, stating that he was solvent, and that the Company had not given him credit for 9000*l.*:—*Held*, that the Court was bound, in the exercise of its equitable jurisdiction, to annul this fiat; as it appeared to have been sued out, not for the legitimate purposes of a fiat in bankruptcy, but to enforce the payment of a disputed partnership debt by an *ex parte* proceeding, during the pendency of a suit in equity. Dissent, *Erskine*, C. J.

The 7 Geo. 4. c. 46., which authorizes the establishment of Joint Stock Banking Companies, by sect. 9, enables one of the public officers of any such Company, *nominated* pursuant to the provisions of the act, to sue and be sued, and to prosecute commissions of bankrupt on behalf of the Company, against any persons, whether members of the copartnership, or otherwise. The 1 & 2 Vict. c. 96, which professes to amend this enactment, declares, that any such public officer may, in his own name, "commence and prosecute any action, suit, or other proceeding at law, or in equity," against any member of the copartnership, and that such member shall be liable to be proceeded against by such public officer, "by such proceedings, and with the same legal consequences, as if such person had not been a member of the said copartnership;" but the last section omits to specify *commissions, or fiats of bankruptcy, eo nomine*.—*Held*, that the two acts were to be taken together, and that the public officer was authorized to sue out a fiat in bankruptcy, against one of the members of the Company.

The affidavit of the public officer stated, "that he was a registered officer, duly authorized to sue on behalf of the Company, united for the purpose of carrying on business, pursuant to the act of parliament;" without stating, that he was duly *nominated*, or that the Company were then *actually carrying on business*:—*Held*, that this was a sufficient allegation in the affidavit of the officer's authority, and that the Company were then in fact carrying on business. Dissent, Sir J. Cross.

An affidavit to support an act of bankruptcy, under the new act of 1 & 2 Vict. c. 110. s. 8. for the Abolition of Arrest on Mesne Process, may be sworn before a Master Extraordinary in Chancery, and filed in the Register's office of the Court of Bankruptcy.

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brickmaker, but had retired from that business in 1829, since which time he had been engaged in no business whatever, except as a shareholder of the above-mentioned bank. He asserted, that his pecuniary credit had always been in good repute. On the formation of the Banking Company, the petitioner obtained a grant of 100 shares in his own name, and 100 other shares in the name of his son. The Manchester board of directors of the Company consisted of nine persons, of whom a Mr. *Moult* was the chairman. The Company were to commence business as soon as 16,000 shares, of 10*l.* each, were subscribed for; and in order to make up the requisite subscription as quickly as possible, it was proposed, that besides the 100 shares, which was the requisite number to qualify a person to act as a Manchester director, there should be entered to each of the directors 900 other shares, on what was termed a cash credit for three years, and on an understanding that the same were not to be sold till the expiration of that time; that in the meantime each director was to be debited with the amount of the calls on such shares, and interest at 4*l.* per cent., and credited with the amount of any dividends in respect thereof; and that at the end of three years such shares should be sold, and that the directors should, after paying what was due to the Company in respect of the calls, be entitled to the proceeds. The petitioner was prevailed on to take such 900 shares, on the assurance of Mr. *Moult*, and other persons taking an active part in the formation of the Company, that he should be allowed to relinquish the shares at any time within the three years. In January 1834, the petitioner opened a private banking account with the Company, by depositing with them 100*l.*; upon which he was furnished

with two pass-books, one called, "The Current Account Pass-book," and the other, "The Stock Account Pass-book;" in which last-mentioned account, the petitioner was debited with the calls and interest on the 900 shares, but not in respect of the 200 shares, in respect of which he paid the calls as they became due, amounting to 2000*l*. On the 1st July 1834, a deed of settlement was entered into between the different shareholders, which the petitioner executed, with the number of 500 shares placed opposite his name, thinking that he might be induced to retain 300 of the 900 shares put down to him as before mentioned, which, with the other 200 shares allotted to him, would make up that number. At the end of the year 1835, a great number of shares having either become forfeited, or agreed by the directors to be taken back from the persons to whom they were originally allotted, the directors agreed to take them at a small premium in equal numbers; and, accordingly, 445 of these shares were allotted to the petitioner and each of the other directors, which, it was arranged, they might sell when they thought fit; but, it being supposed that the sale of shares to any great extent by the directors might be injurious to the Company, it was agreed, that these shares should be allotted to each of the directors in the names of other persons, as trustees, in order that they might appear as the vendors, upon the sale of the shares. The 445 shares were accordingly allotted to the petitioner in the name of his son, *Robert Hall*; and another account was opened in the petitioner's Stock Account Pass-book, headed, "The Northern and Central Bank of England in account with *Robert Hall*, Stock Account." The accountant of the Company, thinking it advisable that the clerks in the

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Bank should not know to what extent the directors were indebted to the Bank, in respect of the several shares allotted to them on cash credit,—a private ledger was kept by the accountant, in which the directors were debited with what was alleged to be due from them in respect of such shares. In June 1836, the petitioner was informed that 100 of the 445 shares, which had been allotted to him in the name of his son, had been sold at a premium, and credit for the amount of the proceeds was given to the petitioner in the Stock Account Pass-book; but the petitioner never gave any directions for this sale, and never executed any deed of transfer of such shares; the sale being effected without the petitioner's knowledge, and for the purpose (as he believed) of silencing his complaints respecting the sale of shares by other directors. In September 1836, the petitioner, being dissatisfied with the amount of shares put down to him, stated to the other directors that he should exercise the power reserved to him of relinquishing the 900 shares, and also the remaining 345 shares allotted to him in the name of his son, although the shares of the bank were then selling at a considerable premium; upon which Mr. *Moult* offered himself to take the 345 shares at the sum of 3937*l.* 10*s.*, and to pay for the same by a bill of exchange, payable twelve months after date; which was agreed to on the part of the petitioner. Mr. *Moult* afterwards agreed to take 500 of the 900 shares at the sum of 5565*l.*, and to pay for them in like manner by a bill at twelve months' date, which the petitioner also agreed to; but he derived no profit from the sale of these shares. The sale was not carried into execution until December 1836, when the petitioner drew two bills on Mr. *Moult*,

which he accepted, for the two sums above-mentioned; and the petitioner paid them over to the accountant of the Company, in part payment of what was charged to the petitioner in respect of the calls on the shares, which had been put down to him on cash credit, and the bills were entered to the credit of the petitioner in the Stock Account Pass-book; and on the same day an entry of the transfer of the shares to Mr. *Moult* was made in the usual way in the Stock Ledger, but no entry was made in the Transfer Book, although the petitioner wished such entry to be made. The petitioner stated, that Mr. *Agnew*, one of the directors, and Mr. *Seddon*, the solicitor of the Company, were present at and cognizant of the sale of the shares to Mr. *Moult*, which was also well known to the other directors; and that no objection was made to such sale.

The petitioner then alleged, that although it was at first intended to carry on the business of the Company, pursuant to the provisions of the act of parliament before-mentioned, yet, in May 1835, the Company established an office in London, which was continued till February 1837, where they carried on the business of bankers, contrary to the provisions of the act, and of other acts, conferring exclusive privileges on the Bank of England; by reason of which, the petitioner contended that the Company were not entitled to sue and be sued in the name of any registered public officer.

The Company being involved in pecuniary difficulties, the directors applied for assistance to the Bank of England, which agreed to make advances to them to a large amount, on condition that the Company should discontinue their banking business until those advances should

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be repaid; and, for the satisfaction of the Bank of England, inspectors were appointed to examine into the affairs of the Company. In pursuance of the agreement entered into with the Bank of England, the Company discontinued their business as bankers on the 1st February 1837, and never afterwards resumed it. Most of the Manchester directors being largely indebted to the Company, the inspectors required them to give security for the balances due from them; upon which it was arranged, that they should execute an assignment, by way of mortgage, of all the shares then belonging to them in the Company, and also of certain shares which many of them had taken in other joint stock companies. Upon the request of Mr. *Moult*, the petitioner delivered up to him the certificates for the remaining 600 shares, and the certificates for certain shares in other companies, in order that the proposed mortgage might be prepared; which shares, the petitioner alleged, would be amply sufficient to secure the payment of any balance due from him to the Company. The petitioner shortly afterwards discovered, to his great surprise, that Mr. *Moult* intended to comprise in the mortgage not only the 600 shares, but also the 845 shares, which he had sold to Mr. *Moult*, and the certificates for which were in Mr. *Moult's* name, and in his possession. The petitioner immediately refused to execute any mortgage which comprised these shares as belonging to him; upon which Mr. *Moult* stated, that the only reason for comprising them in the mortgage was, that the inspectors had objected to recognize the sale of them to him; but that the execution of the proposed mortgage would not in any way affect the sale; when the petitioner insisted upon having a letter to that effect from Mr. *Moult*,

which, upon Mr. *Moult* consenting to give, the petitioner was persuaded by him to execute the mortgage. Mr. *Moult*, accordingly, on the 23rd January 1837, addressed a letter to the petitioner in the following terms:

"In consequence of the Committee of Inspectors having declined to recognize the sale of 845 shares of this bank's stock by you to me, I hereby, nevertheless, become bound to account to you for the full value thereof, as formerly agreed between us, and that, under any circumstances, you shall come by no loss on these shares."

The indenture of mortgage, which the petitioner was thus induced to execute, had been already prepared and ingrossed for his signature; it bore date on the 21st January 1837, and after reciting that the petitioner was the owner of 1445 shares in the Northern and Central Bank, as also the owner of certain other shares in two other companies, and that the petitioner upon his banking account was indebted to the Company in 15,000*l.*, the petitioner was made to assign to trustees all the shares above specified for securing the payment of such debt. The petitioner alleged, that previous to the execution of this assignment, neither the petitioner, nor any one on his behalf, read the same, or any draft thereof; and that he was, until some days afterwards, when he applied for a copy of it, ignorant of the recital in it stating that he was indebted to the Company in the sum of 15,000*l.* In estimating this balance, the petitioner supposed that the only reason why the Bank had given him no credit for the two bills of exchange before-mentioned was, because they would not be due until the month of December following. After the execution of the assignment, the petitioner sold some shares in another Company, and allowed the proceeds thereof,

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amounting to near 4000*l.*, to be placed to the credit of his account with the Northern and Central Bank. The petitioner, upon being afterwards pressed by the trustees for further security, in August 1837, deposited with the solicitor of the Company the title-deeds of certain freehold property at Manchester, by way of equitable mortgage.

The petitioner alleged, that the Company never presented for payment the two bills for 3937*l.* 10*s.* and 5565*l.* to Mr. *Moult*, the acceptor, nor ever gave the petitioner notice of their dishonour; and that when the bills fell due, in December 1837, Mr. *Moult* was solvent and in good credit, but that he had since become involved in pecuniary difficulties. In consequence of this neglect on the part of the Company, the petitioner insisted that he was discharged from all liability, as drawer of the bills, and was entitled to be credited with the amount of them, in taking an account of what was due from him to the Company; but the Company, on the 12th January 1838, delivered an account to the petitioner, claiming a balance due from him of 17,000*l.* On the following day the petitioner wrote to the directors of the Company a letter, in which he complained of the omission to credit him with the amount of the two bills, and desired to have the account rectified in this respect. The directors, however, refused to do this, and on the 20th April 1838, brought an action at law against the petitioner for the recovery of the 17,000*l.*; in which action no declaration was filed, and the attorneys for the plaintiffs afterwards obtained a rule to discontinue. On the 25th May 1838, the directors filed a bill in the Court of Exchequer against the petitioner, for a sale of the property which was the subject of the equitable mortgage, and for an account; to which the petitioner

put in his answer in October following. On the 17th October, the directors, by *Edward Connell*, as one of the registered public officers of the Company, commenced another action in the Queen's Bench against the petitioner, for the recovery of the above balance claimed by them, which was still pending; but no declaration had been filed in it. On the 4th October, the petitioner was served with a copy of an affidavit sworn by a *Mr. Stubbs*, as one of the registered public officers of the Company, and with a notice in writing, under the 1 & 2 Vict. c. 110. s. 8, requiring immediate payment of a debt of 15,000*l.* due to the Banking Company. On the 17th October, the petitioner's agents tendered to one of the Commissioners of the Court of Bankruptcy an affidavit of the petitioner, in which he swore that he was not indebted to the Company in the sum of 15,000*l.*, and that if a fair account was taken of what was really due from the petitioner, the balance would not amount to more than 5000*l.*, for which the securities before mentioned were amply sufficient for the payment of it; that the petitioner was willing to come to a fair account with the Company; and that he had no intention of leaving the kingdom, or avoiding the payment of what might be found due from him. The Commissioner declined to receive this affidavit, on the ground that he had no jurisdiction but to ascertain that there were two sufficient sureties to the bond required by the act, having regard to the amount of the debt sworn to. The petitioner alleged, that he could without difficulty have obtained sufficient sureties to enter into a bond for the balance due from him, after deducting the amount of the two bills of exchange; but that he was advised, under all the circumstances, he would not be liable to be deemed to have committed an

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act of bankruptcy, by reason of omitting to enter into the required bond; and that he therefore determined not to enter into such bond.

On the 31st October 1838 a fiat in bankruptcy was issued against the petitioner, as a banker, at the instance of Mr. *Stubbs*, as the petitioning creditor on behalf of the Banking Company; which on the following day was opened, when the petitioner was adjudged a bankrupt, as he alleged, upon false and deceitful evidence, and Mr. *Stubbs* was appointed the provisional assignee. The petitioner stated, that, in anticipation of a fiat being issued against him, he caused instructions to be laid before counsel to prepare a petition, that he might be heard by counsel before the Commissioners at the opening of the fiat, and that publication might be stayed in the Gazette; but, from the rapidity of the proceedings under the fiat, he was prevented from so doing. The petitioner alleged, that he never at any time carried on the business of a banker, except by holding shares in joint stock banking companies, nor any other trade or business whatever, since the year 1829; and that, even if he was a trader within the bankrupt law, he had committed no act of bankruptcy, except so far as he might be deemed to have committed one, by not entering into a bond under the 1 & 2 Vict. c. 110, as before mentioned; that he was perfectly solvent, and was not indebted to any other persons besides the Banking Company, except in a few small sums, not exceeding 5*l.* in the whole; and except what he might owe to his solicitors, for defending him in the various proceedings before mentioned.

The petition then alleged, that by the Company's deed of settlement it was provided, that in case losses should be sustained by the Company, to the whole amount of

the fund called the Reserve Surplus Fund, and the amount of one-fourth part of the capital which for the time being should have been actually paid up, the directors were required to call an extraordinary general meeting of the proprietors, for the purpose of taking into consideration the propriety of dissolving or continuing the Company. That the directors were required by the petitioner to call such a meeting, which they refused to do, alleging, that losses to the requisite amount had not been sustained. That if such allegation of the directors were true, there would, upon the winding-up of the Company's affairs, after allowing 10s. per share for expenses, be due 7l. per share to each proprietor, making, on the 1445 shares assigned by the petitioner to the Company for securing the petitioner's debt, a sum of 10,115l. That the shares of the petitioner in the other Joint Stock Banking Companies, comprised in the above-mentioned assignment, were of the value of 3100l.; and the value of the property subject to the equitable mortgage was at least 3000l., making the value of the said securities to amount together to 16,250l.; but that, even supposing a greater loss to have been sustained by the Company, than what was alleged by the directors, the value of the above securities would be amply sufficient for the payment of what was justly due from the petitioner.

The petitioner then stated certain facts, from which he inferred a vindictive spirit was entertained against him by the solicitor to the Banking Company, and that the directors had been instigated by him in their harsh proceedings against the petitioner.

The prayer was, that the fiat might be annulled, and the bond assigned, at the costs of the petitioning creditor, or of the Banking Company.

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Mr. *Anderdon*, and Mr. *Geldart*, in support of the petition.

The present fiat was sued out by the Company, during the pendency of a suit in equity for collateral purposes. [Sir *George Rose*. There is an important point for consideration in this case, namely, whether the representative of a company can properly strike a docket against a copartner, upon a debt due to the company. No such power exists in the ordinary operation of the Bankrupt Law; and the point to be considered is, therefore, whether the acts of parliament, commonly called the Banking Acts, give such an authority (a).] This Company is established under an ordinary deed of partnership, without any special act of parliament. We contend, here, 1st, that the petitioning creditor had no authority whatever to sue out a fiat against Mr. *Hall*; 2nd, that Mr. *Hall* was not a trader, within the Bankrupt Law; and, 3rdly, that Mr. *Hall* has committed no valid act of bankruptcy.

As to the first point, it is provided by the act which authorizes generally the establishment of joint stock banking companies, 7 *Geo.* 4. c. 46. s. 9., that all actions and suits against any persons, who might be indebted to any such copartnership, might be commenced in the name of any one of the public registered officers of the Company. And by a more recent statute, the 1 & 2 *Vict.* c. 96., which recites the former act, it is enacted, "that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding at law or in equity, against any person being or having been a member of the said copartnership, either alone, or jointly with any other person, against

(a) See 7 *Geo.* 4. c. 46. s. 9.; 1 & 2 *Vict.* c. 96.

whom any such copartnership has, or may, have any demand whatsoever." But there is nothing in this last statute, which authorizes the public officer to issue a fiat in bankruptcy. Now, by the case of *Guthrie v. Fiske* (a), where an act of parliament enabled a Company to sue and be sued in the name of their secretary, and enacted, that they might commence all *actions and suits* in his name, as nominal plaintiff; it was held, that this did not enable the secretary to petition, on behalf of the Company, for a commission of bankruptcy against their debtor (b).

Then, with respect to the trading; it was a question, in *Ex parte Brundrett* (c), whether the mere holding of shares in a joint stock banking company constituted a trading, within the meaning of the Bankrupt Law. But, although the several members of this Banking Company might be held to be traders, as between themselves and

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(a) 3 B. & C. 178.

(b) The case of *Guthrie v. Fiske* proceeded upon the construction of a private act of parliament, in which no mention was made of suing out a commission of bankruptcy. But by the 9th section of the 7 Geo. 4. c. 46. it is enacted, " that all actions and suits, *and also all petitions to found any commission of bankruptcy against any person or persons*, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, *and all proceedings at law or in equity, under any commission of bankruptcy*, and all other proceedings at law or in equity, to be commenced or instituted, for or on behalf of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced, or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff, or petitioner, for and on behalf of such copartnership." The words in italics appear to have been introduced into the act, in consequence of the decision in *Guthrie v. Fiske*, which occurred two years before this act was passed.

(c) 2 Desc. 249.

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the public, yet they were not so, *inter se*. There has, as yet, been no decision on that point.

The next objection to this fiat turns on the alleged act of bankruptcy, which depends upon the construction of the recent statute of the 1 & 2 Vict. c. 110, for abolishing Arrest on Mesne Process. By section 8 of that statute, it is enacted, "that if any single creditor, or any two or more creditors, being partners, whose debt shall amount to 100*l.*, or upwards, &c. of any trader within the meaning of the laws now in force concerning bankrupts, shall file an affidavit, or affidavits, in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him, or them, respectively; and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same, to the satisfaction of such creditor or creditors, or enter into a bond, in such sum, and with such two sufficient sureties, as a Commissioner of the Court of Bankruptcy shall approve of, to pay *such* sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been, or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court, or any Judge thereof, shall direct, after judgment shall have been recovered in such action,

every such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader, within two calendar months from the filing of such affidavit or affidavits, but not otherwise." [*Erskine*, C. J. This law has the same effect, as the lying in prison twenty-one days, under the former statute.] The fiat against Mr. *Hall* was sued out on an affidavit setting forth his default, in not complying with any of the requisitions of this statute, as the alleged act of bankruptcy. The petitioning creditor swore, that the enormous sum of 15,000*l.* was due from Mr. *Hall* to the Company, and called on him to furnish bail to that amount. Now, however high might be the credit of a commercial gentleman, some difficulty might reasonably be expected to arise in procuring bail for so large a sum, many persons being prohibited by partnership agreements from rendering such assistance to their friends. Mr. *Hall*, however, found one friend, an eminent London banker, who offered bail for the whole sum; but, while the negotiations for another surety were in progress, the time elapsed which is limited by the statute for this purpose; and this, it is now contended, sufficed to constitute an act of bankruptcy. Mr. *Hall* says, that he does not owe the Company a third of the sum for which he was required to find bail, and that the real amount of the debt is covered by the securities they hold. But there is a fatal objection to the affidavit sworn by the petitioning creditor. The act of parliament requires it to be filed in the *Courts* of Bankruptcy. It is not easy to understand what is meant by the use of the plural number; and it may be

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supposed to be a literal error, from the words "a Commissioner of the Court of Bankruptcy" occurring in a subsequent part of the section. But the present affidavit was not sworn in any Court of Bankruptcy, but before a Master Extraordinary of the Court of Chancery, residing at Manchester, who could have nothing to do with the affidavit. Whether it was intended by the act of parliament to bring parties from an indefinite distance in the country, to swear an affidavit before one of the Commissioners of the Court of Bankruptcy in Basinghall Street, it is not necessary to inquire; but whatever construction is put upon the statute, the present affidavit must fall to the ground, and all the proceedings founded on it are wholly nugatory. The affidavit, also, is not entitled in any cause or matter. How, then, could an indictment for perjury lie on such an affidavit? [Sir *George Rose*. The main point to be considered is, whether the Court will allow its process to be used, after the proceedings which have taken place in the Courts of Exchequer and Queen's Bench,—and upon an act of bankruptcy created by the act of the very party, who was an adverse litigant in those suits. It might be a good act of bankruptcy, perhaps, in the hands of other creditors, if there were any; but ought it to be allowed to be taken advantage of by the party who had forced the petitioner into that position?]

There is another objection to the fiat, which is, that the Company, who sued it out by their public officer, have forfeited all their rights under the 7 *Geo. 4. c. 26.*, by breaking the restrictions of that act, and interfering with the rights and privileges of the Bank of England; for they opened an office in Charlotte Row, in the City of London, for the transaction of general

banking business, both of deposit and of issue; although the Bank of England had consented to forego its rights only, on the express condition that no bank of this description should be opened within sixty miles of the metropolis. But, independently of the Company having thus forfeited their rights by a violation of the privileges of the Bank of England, they had ceased to exist as a Company, when this fiat was sued out; having long before discontinued the business for which they were established, and having no operations, except so far as related to winding up the concern. They had no right, therefore, to do any act by a public registered officer, under the 7 Geo. 4. c. 26. At all events, it was not competent to them to sue out a commission against a shareholder, on an unsettled account.

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Mr. *Swanston*, Mr. *Wightman*, and Mr. *Bacon*, for the petitioning creditor.

A brief statement of facts will serve to explain the conduct of the respondents. Mr. *Hall*, the petitioner, was intimately connected with the Northern and Central Bank, in the different characters of trustee, acting director, and customer. He was, in 1836, a debtor to the bank in the amount of 15,000*l.*, for cash advances to him as a customer,—and also as a shareholder, for default of payment of arrears on a large number of shares. When the Bank of England took upon itself to interfere, on account of the difficulties and embarrassments of this Banking Company, four inspectors were appointed to investigate the state of the accounts. It was then for the first time discovered, that there had been certain dealings between the bankrupt and a gentleman named *Moult*. Mr. *Hall*, holding between 1400 and 1500

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shares in 1836, had agreed privately to transfer 900 shares to Mr. *Moult*, on payment by bills of exchange for 9000*l*. This was altogether a secret transaction; there was no entry of the transfer, except in the private book of the chief accountant, and no fees were paid upon the transfer. On its discovery, the arrangement was not recognized, and Mr. *Moult* received back the bills. The entry in the private book was corrected, and an alteration would have been made in Mr. *Hall*'s pass book, had it been possible to obtain access to it, which was attempted in vain. Mr. *Hall* then executed the assignment of the 21st January 1837, whereby he conveyed to trustees for the Banking Company 1445 shares in that establishment, as security for the sum owing by him, and also 60 shares in the Agricultural and Commercial Bank. A sum of 15,000*l*. was then admitted by the deed to be due from the petitioner, on his banking account. After that, what right has he now to object, that *Moult*'s bills have not been accounted for? The bank was embarrassed, from its extensive advances to various individuals, the petitioner amongst the number; and he was applied to for the purpose of making his assignment available, but he refused even to give the dividend warrants on the shares. An action was accordingly commenced on good grounds; but it being discovered, that Mr. *Hall* proposed taking advantage of some technical difficulties, which have been subsequently remedied by a recent statute, the action was, under legal advice, discontinued. In August 1837, application was made to Mr. *Hall* for further security, the deed of January being useless; and he then deposited the title-deeds of certain estates. This security proving also unavailable, the Company were advised to file a bill in the

Court of Exchequer, for a sale of the property, and for a declaration of what was due from the petitioner on account. This suit was commenced before the act of her present Majesty had passed, and when the altered position about to arise between these parties could not have been foreseen. [*Erskine*, C. J. There is no doubt, that there was nothing to prevent the issuing of a fiat, on another act of bankruptcy.] That view of the case will certainly much narrow the question to be discussed. [Sir *John Cross*. The notice and default under the new act are admitted; but the doubt is, as to the sufficiency of the affidavit. The 8th section of the statute creates a new act of bankruptcy, in which there are two incidents, the affidavit of debt by a creditor, and the debtor's subsequent default. The latter is admitted; but as to the former, it is objected, that the affidavit was not taken before a proper officer, or sworn by a proper party.] The proceedings of the respondents were taken for the purpose of enforcing the security they held, the act of bankruptcy being merely incidental. We contend, it is a good act of bankruptcy, and that the only question is, whether it is competent to the bank to take advantage of the power afforded by the statute. The pendency of a suit in equity would not have prevented an arrest for debt under the old practice; and if the defendant had continued twenty-one days in prison, he would have committed an act of bankruptcy; and the right of the plaintiff in the action to avail himself of an act of bankruptcy thus obtained, could not have been disputed. [Sir *George Rose*. Having a claim for an equitable debt, the respondents endeavour to establish it by a suit in equity, and, during the pendency of that suit, take other proceedings against Mr. *Hall* to force him into an

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act of bankruptcy. The question is, whether this is not an abuse of the process of the Court. It will be material, therefore, to see what other creditors are to be benefited, and whether there is any other property to be disposed of. There may be a difficulty, also, in working the fiat, arising from the relation between the bankrupt and his co-proprietors in the Banking Company.] If the fiat be good, there will be no difficulty, which this Court cannot deal with, in effecting the proper arrangements for working it equitably. There would be no more difficulty in administering the assets under this fiat, than in the common case where there are joint and separate estates to be administered under the same fiat. A distinction has been taken between an act of bankruptcy committed by the bankrupt of his own accord, and one that is caused by the conduct of the petitioning creditor. There is no such distinction. A creditor could, before this statute, have caused his debtor to commit an act of bankruptcy, by arresting him for the debt, if he lay in prison twenty-one days after the arrest. But the intention of the petitioning creditor in this case, was not to compel Mr. *Hall* to commit an act of bankruptcy, but to compel him to give security for the debt. [Sir *George Rose*. The respondents must elect, either to abandon the suit in equity, on payment of all the costs, or to have the fiat annulled.] There is no question of election in this case. We stand on the legal validity of the fiat. In *Ex parte Grazebrooke* (a), where, after a dissolution of partnership, the retiring partner sued the continuing partner for the balance due, and took a cognovit for the debt and costs; it was held, that he might nevertheless prove his debt against the

(a) 2 Deac. & C. 186.

estate of the continuing partner, who had become bankrupt, although some partnership debts were unpaid. There is no necessity that the account should be liquidated between these parties, to entitle the bank to sue out a fiat against Mr. *Hall*; for in *Flower v. Herbert*(a) it was held, that a debt on account, though not liquidated, was a foundation for a commission of bankruptcy.

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We will now call the attention of the Court to the particular act of bankruptcy on which this fiat is founded, which we say is perfectly conformable to the requisitions of the statute. The affidavit of *Stubbs*, the petitioning creditor, states, that he is one of the registered public officers of the Northern and Central Bank of England; it correctly describes the deponent, and the persons for whom he acts. [Sir *John Cross*. The act of bankruptcy in this case entirely depends on the validity of the affidavit, which ought to show, that the creditors are such persons as are authorized to sue by their officer. Now, the affidavit appears defective, in omitting to show that the members of this Company consist of more than six persons, or that their names, or the name of Mr. *Stubbs*, as the *authorized* officer of the Company, have ever been returned to the stamp office, or that he was registered at the stamp office as such officer, pursuant to the provisions of the 7 *Geo. 4. c. 46*. Nor does it appear, that he is a member of the Company; and the act says, that only a member of a Company can be appointed as an officer.] [*Erskine, C. J.* The affidavit appears to me to go further, by stating that he was an officer of the Company, duly registered according to the provisions of the act of parliament. What strikes me is, that where a party swears that he is an officer duly constituted to sue

(a) 2 Ves. 327.

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and be sued on behalf of the Company, pursuant to the act of parliament, we must take it that he has complied with all the requisitions of the act of parliament.] The affidavit states, that *Stubbs* is one of the registered public officers of the Company, and that the Company are united for the purpose of carrying on business, pursuant to the act of parliament in such case made and provided. [Sir *John Cross*. Should not the affidavit state, that the Company were, *in fact*, then actually carrying on business pursuant to the act of parliament, instead merely of being united *for that purpose*?] The expression of being "united for the purpose of carrying on business," does not necessarily imply an *intention* merely of carrying on business *in futuro*; but the reasonable interpretation of those words is, that they are *now* united for the purpose, at this moment, of carrying on business. It must be taken, that the union is according to the provisions of the act of parliament. Then, as to the affidavit not stating, that the names of the members of the Company are registered at the stamp office,—there is only one register required by the act; and therefore, stating that the officer is duly registered, shows that the other persons are registered. The affidavit states, also, that the deponent "was duly nominated and constituted to sue." Now, he would not be duly nominated, if the Company were not registered.

An objection has been made to the form of the affidavit, on the ground of its not being entitled in any Court. Now, in order to dispose of this objection, we must look to an analogous case, before the statute passed; and it will be found, that an affidavit made for the mere purpose of issuing a commission of bankruptcy was never entitled in any Court. The act of parliament does not specify any parti-

cular tribunal, before which the affidavit is to be made. Who is to act on the affidavit, when made? Why, the Lord Chancellor, who issues the fiat. [*Erskine*, C. J. Is not the better way of putting it,—as this affidavit is to be filed in the Court of Bankruptcy, ought it not to be made before an officer of this Court?] It has been contended, too, on the other side, that this Company carried on the business of bankers, contrary to the provisions of the 7 *Geo.* 4. c. 26., by carrying it on in *London*; but the 3 & 4 *Will.* 4. c. 98. repealed the provision of that statute, as to this point. [Mr. *Geldart*. There is a distinction between banks of issue, and banks of mere deposit. The present is a bank of issue; and therefore it was illegal to carry on the business in *London*.] Under the 9th section of the 7 *Geo.* 4. c. 46., not only actions and suits, but also petitions to found any commission of bankruptcy, may be instituted in the name of any one of the public officers of the Company, as the nominal plaintiff or petitioner. The case of *Guthrie v. Fish* (a) has been cited by the other side, to show that a commission of bankrupt does not fall within the description of an action at law, or suit in equity. [Sir *John Cross*. They contend, on the other side, that the last act of 1 & 2 *Vict.* c. 96. only authorizes the officer to bring *actions and suits*, and does not mention fiats in bankruptcy, although the former statute of 7 *Geo.* 4. c. 46. specified commissions of bankruptcy.] The private act parliament, on which *Guthrie v. Fish* was decided, specified merely “all actions and suits,” and did not include, as the 1 & 2 *Vict.* c. 96. does, the words “proceedings at law.” But when that case was

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(a) 3 B. & C. 178.

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previously before Lord *Eldon* (a), his impression was, that the words "actions and suits" alone might include commissions of bankruptcy. But the last-mentioned act says expressly, that every member of such a copartnership shall "be liable to be *proceeded* against by, or for the benefit of, the said copartnership, by such public officer as aforesaid, by such *proceedings*, and with the same legal consequences, as if such person had not been a member of the said copartnership."

It may be further observed, with respect to the form of the affidavit, that the act of 1 & 2 *Vict.* c. 96. does not require any particular form, nor could the mere form of the affidavit come in issue in any proceeding in bankruptcy. The affidavit is quite sufficient, *primâ facie*. It is open to the other side, to show that there is any illegality in the constitution of the Company, or in the appointment of Mr. *Stubbs* as their public officer, for want of registration, or any other cause.

As to the doubt that has been raised, in regard to the trading,—it has been determined in a recent case by the Court of Exchequer, that holding a share in one of these banks did make the shareholder a trader, within the meaning of the bankrupt law. And the petitioning creditor's debt cannot be disputed; since the bankrupt, by the deed of the 21st January 1837, acknowledged himself to be indebted to the Company in the sum of 15,000*l.*

Mr. *Anderdon*, in reply. We have the authority of Lord *Eldon* for saying, that a commission of bankrupt is not a proceeding at law or in equity. But

(a) *Es parte Guthrie*, 1 G. & J. 245.

there is a difficulty, which the other side have not in any way grappled with. The bankrupt law allows a right of set-off between the bankrupt and his creditor, and directs that the balance only shall be taken as the debt. But how could there be a right of set-off between these parties, standing in the relation they did to each other? A mode of testing the intention of the act of parliament is, by looking at the mutuality between these parties. There is no mutuality here; for, supposing the Company could prove against the bankrupt, he would have no right of set-off; the 4th section of the 1 Vict. c. 96. declaring, that no claim or demand, which any member of one of these companies may have in respect of his share, shall be capable of being set off, either at law or in equity, against any demand of the Company against himself; but that all proceedings may be carried on, as if no such claim or demand existed. The word "*proceedings*," which occurs in the act, we submit, will not enable the officer of the Company to sue out a fiat in bankruptcy, which is a proceeding *sui generis*, and would, doubtless, if contemplated, have been expressly mentioned in the act. If the Company can issue a fiat against Mr. *Hall*, they could also prove against his estate. But can one partner prove against another, without taking an account of the debts and credits of the partnership? It is admitted, that if a party swore a trader owed him 1000*l.*, and he did not owe him 1000 pence, still if he lay in prison twenty-one days without giving bail, that would be an act of bankruptcy. But then there must be a legal capacity of one party, to sue the other at law; and not, as in this case, a proceeding by one partner against another. The case of *Guthrie v. Fisk* proves, that, although there may be a

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right of action, it does not follow that the Company may sue out a fiat against one of their own members. There is no express authority to this effect, given by the 1 & 2 Vict. c. 96. Is there, then, any implied authority? If not, there is no case whatever, in which it has been held, that one partner may sue out a commission or fiat in bankruptcy against his copartner. In *Ex parte Gray (a)*, it was expressly held by this Court, that one partner could not sue out a fiat against another.

Then, as to the form of the affidavit, the act of parliament requires that the affidavit should be made by a *creditor*. Now the party, who has made the affidavit in this case, is not a *creditor*. The act also requires, that the affidavit shall be made in the Court of Bankruptcy; but this affidavit does not appear to have been so made; for it is not entitled in any Court. An affidavit sworn before a Master in Chancery, and not entitled in any Court, is no affidavit at all. We may reason, in regard to the validity of this affidavit, by analogy to the practice that prevails with respect to affidavits to hold to bail; which, if wrongfully entitled, are of no effect in a Court of Law. Thus, an affidavit entitled in the Common Pleas would be bad in a proceeding in the Queen's Bench. The affidavit in the present case might as well be taken before a magistrate, as before a Master in Chancery. The way to test the validity of it is, to try whether an indictment for perjury could be supported on an affidavit of this description. It is impossible to contend, that such an indictment would lie on this affidavit.

But the affidavit is bad in substance, as well as in

(a) 4 Deac. & C. 778.

form. The 7 *Geo.* 4. c. 46. s. 9. imposes two conditions on the right of the Company to sue by their public officer: 1st, that the Company shall carry on business under the provisions of the act; and 2ndly, that the public officer shall be appointed according to the directions of the act; which provisions are ingrafted in the statute of 1 & 2 *Vict.* c. 96. Now, in this case, neither of those conditions has been properly complied with; for the Company were not carrying on business under the provisions of the act, nor does the affidavit appear to be made by a public officer, whose name has been returned to the stamp office, pursuant to the directions of the act. Then, does the affidavit state here what is required by the statute? In *Ex parte Harcourt* (a), where the question was, whether a member of parliament had been declared a bankrupt pursuant to the provisions of the 4 *Geo.* 3. c. 33., Lord *Eldon* said, that a party could not be brought within the operation of the statute, unless there was a complete and established concurrence of all the circumstances which the act of parliament required. Then, who is to give the bond to the Lord Chancellor, upon suing out the fiat in this case? The bond ought to be given by the petitioning creditor of the bankrupt. But, as was observed by Mr. Justice *Holroyd* in *Guthrie v. Fisk* (b), *non constat*, that the public officer is a creditor of the bankrupt; for he may not be a member of the society.

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ERSKINE, C. J.—Although I entertain but little doubt on the question, yet as it is a new case, and there may be some difference of opinion on a portion of it, the

(a) 2 *Rose*, 203.(b) 3 *B. & C.* 183.

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Court will take time to deliberate, before it pronounces its judgment.

Cur. adv. vult.

November 26. The COURT this day proceeded to give judgment; but there being a difference of opinion among the Judges, they delivered their judgments in the following order.

Sir GEORGE ROSE.—Although I still retain the opinion, which during the argument I had occasion to express, as to the validity in law of this fiat, yet, shaken as that opinion necessarily is, by the doubt entertained by one of my learned colleagues, I am desirous to address a few observations to that part of the case.

As to the trading, I believe there is no difference. A case has been relied on, in which this Court held, that the holding of shares in a Joint Stock Company, like the present, did not constitute a trading within the description of a banker. It is true, that it was there held, that if a person became a member of such a society, for the purpose of bringing himself thereby within the operation of the Bankrupt Law, he himself could not, against the petition of an aggrieved creditor challenging the fiat, rely upon it as a trading; but no doubt whatever was expressed, that as against himself, or at the instance of any other person, it would have been sufficient.

With regard to the petitioning creditor's debt, it was properly put by Mr. *Anderdon*, that, standing as these parties, petitioner and respondent, do, both of them members of the partnership to which the debt is due, no fiat could stand upon a debt so qualified; and certainly, without the aid of the acts of parliament on which these joint stock banks found their right, it would

be difficult to deny that proposition. But it appears to me, that, looking at the constitution and nature of these companies, the remedies which they required, and the facilities necessary for their very existence, all evidently within the intention and purview of these acts, little would have been done, if the construction be right, that in authorizing the suing out of a fiat, it was intended only to remove the difficulty suggested by the case of *Guthrie v. Fish*; and my opinion is, that both the language used, and the remedy required and intended, sanction the suing out a fiat in this case, although, by the general law, the person who is thus made a bankrupt, would, by the circumstance of his being a partner, be exempt from such process at the instance of his copartner, upon a debt due to the firm, and so, in a sense, also to himself, as a member of it.

With regard to the act of bankruptcy—that is presented to us, as it appears upon the proceedings; and I see no reason for saying that it is bad. If it be put, that a part of it appears to be upon the deposition of the creditor himself,—why—1st, of necessity it must be so; 2nd, no part of it is so proved, but what would be a legitimate inference from what is proved, *aliunde*; and, 3rd, this is the petition of the bankrupt himself, and, so far, would dispose of the objection, were there any thing more serious in it. But then it has been said, as I understand the objection, that the affidavit filed in the Court of Bankruptcy has not been, as it ought to have been, entitled, and has not been properly sworn; and, moreover, that the person making it is not, as he ought to be, a creditor. Now, taking this last observation first, it appears to me that he is to be considered a creditor; at least, answering that description in the sense

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in which the statutes in bankruptcy, for this purpose statutes in *pari materid*, have sanctioned the use of that word.

With respect to the objection to the affidavit, upon the defect of title,—whether it ought to have been entitled in the Court, and sworn before a Commissioner of that Court, in which it has been made a substitute for special bail in an action brought, or intended to be brought,—or whether prospectively looking, as it does, to a fiat, it should have been entitled in the Court of Bankruptcy, where it is directed to be filed: as to where, and before whom, the affidavit is to be made, and how, if at all, entitled, the legislature has given no directions; and has, therefore, left it open to be governed by general principles and practice. Practically, and for every purpose, the want of a specific title is immaterial; it is to be considered, as purporting to be made in the matter of, or under the act of parliament; and no person served with it could, for a moment, mistake its object or operation. That it has been taken before a Master in Chancery, has likewise been pressed as an objection; but, without saying how far an affidavit of this nature is, of necessity, or exclusively, to be sworn before a Master in Chancery, if you attend to the statutes in bankruptcy, and to the whole practice in bankruptcy, both as authorized by statute, and by analogous practice adopted from the Court of Chancery independently of statute, is it possible to say, that an affidavit to be filed in the Court of Bankruptcy was not properly made before a Master in Chancery, and properly received by the learned Commissioner? Did any difficulty exist in this respect, let us see how the Courts of Law have dealt with it in the cases of special bail, where, although there is an officer ap-

pointed for that purpose, yet the Court, in its discretion, dispenses with the statutory directions, and recognizes the competency of such extrinsic authority, as it deems deserving of such recognition—a judge in Ireland, or a consul or magistrate abroad. It has been put in those cases, as in this, that by so doing the party, if aggrieved, is deprived of an indictment for perjury; and the answer has been, as here, that there would be no difficulty in proceeding for the misdemeanor, in perverting the course of justice. When, therefore, this affidavit was submitted to the learned Commissioner, and he was thereupon required to exercise those functions which the legislature has committed to him, all he had to do was to satisfy himself that there was that sanction of an oath, which, as a Commissioner, he could recognize; and all that I can say is, that I should have acted as the learned Commissioner in this case has done. It does not appear, that he was called upon to regulate the amount of the security by any of the circumstances here alleged, as affecting its amount; nor is it necessary to say how far, if his attention had been called to them, it would have been within the scope of his duty to have acted upon them: in point of fact, the petitioner has been, by the respondent, put under the necessity of finding security to this great amount; and the result has been, as probably in most of these cases it will always be, an act of bankruptcy.

Taking it, therefore,—and I so put it during the argument,—that the bankruptcy is good, as to the requisites of trading, debt, and act of bankruptcy, yet it is quite a different proposition, that this Court will suffer it to be prosecuted. Every argument was put, and strongly put, by the counsel for the respondents, to meet this view of

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it, so thrown out for their consideration; and, at the conclusion of the argument, it was intimated that, at all events, if the bankruptcy were to go on, it must be under some arrangement in respect to the suit in the Exchequer,—as at least a case of election. And with a view to what would necessarily influence the case in the final disposal of it, and to which I shall advert in the sequel, it was intimated, that the proceedings ought to go on to the choice of assignees; and to the choice of assignees they have gone on accordingly. The more, however, that I have considered this case, the more am I confirmed in the opinion, that to leave the respondents to their election, would fall far short of what the bankrupt is entitled to, if he tells us, as he does tell us, that he will not be satisfied with this alternative; and as he so tells us, I have not the least hesitation in saying,—upon grounds already adverted to, and from such circumstances as the state of these proceedings, now carried up to the time for the choice of assignees, have supplied—that this fiat must be superseded.

In arriving at this conclusion, I have looked at the case, first, independently of all those circumstances which affect it by reason of the suit in the Exchequer; secondly, independently of the effect which the state of the proceedings, worked to the point to which they now have been carried, is to have upon our judgment. I put those points, for a moment, entirely out of sight; and I take the case, abstracted from them, as at the moment when this affidavit having ended in an act of bankruptcy, a fiat had issued upon it; at which point of time, without saying any thing as to jurisdiction before that time—at that time, at least, this Court would have acquired jurisdiction. Now, let us consider the ground upon which, and

the manner in which, this Court would have then dealt with the fiat,—interfering, as it has been pressed upon us, against a legal fiat—against, as it has been said, legal rights. But, in passing, may it not be asked, are not the respondents placing their legal rights rather too high? Are they right in saying, that there is a legal debt due to them of 15,000*l.*? The attention of the parties has surely not been directed accurately to this deed, when it is said, that *thereby* is created a legal debt from this petitioner to *them*. Is it any thing more than a statement, that there were accounts then current and subsisting between this petitioner and his copartners, the bank,—that at that time, that amount of 15,000*l.* was owing, and that property had been given as a security for it? It is evidence, undoubtedly, of an existing item then due of 15,000*l.*; but there is no covenant which constitutes it as a legal debt between this party and the bank. Now, supposing the petitioner to have come here upon the issuing of the fiat, and said, “I admit that there is 15,000*l.* as an item against me in account, for which trustees hold my property. I am solvent—I am ready to go to the account, and pay the balance, if any, after realizing the securities—I have no other creditor.” My notion of what the Court would have done in such a case, would have been, let the fiat proceed to the adjudication;—let the petitioner be at liberty to attend the Commissioners;—upon bankruptcy found, or not found, let him come back to the Court immediately;—suspend the advertisement in the Gazette, in the event of adjudication; and reserve further directions. Now, if that course had been taken, when it did come back upon the adjudication, my learned colleague, who is of opinion, that the act of bankruptcy upon the proceedings is insuf-

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ficient, would of course have superseded the fiat. With regard to myself, as I am satisfied with the validity of the adjudication, I must have suffered the advertisement to be made, and the fiat to proceed, unless there were extrinsic grounds upon which I ought to restrain them.

Now, in this way of looking at it, if it were not for these acts of parliament, the petitioning creditor in this case could not have taken out a fiat against the petitioner; or, having taken it out, he could not possibly have worked it, without having the accounts taken, so as to ascertain the correct amount of his proveable debt. Were it not for these acts of parliament, he could not have taken out a fiat himself;—he could not have proved under a fiat taken out by any other person, unless by the especial permission, and under the regulation of this Court. The first act of parliament, which gave a right to take out a fiat, had it rested there, would still have left the petitioning creditor entitled, at the utmost, to nothing more than a claim, until the proceeds of any security he had should have been realized, and the balance ascertained; and then only to a proof upon terms. The subsequent act, by which the taking of the accounts and the set-off is rendered unnecessary, it is contended, would have left him at liberty to proceed upon his debt, as he claims it—and so probably it would have stood, had there been nothing more in the case than the abstract relation of the parties. But is there nothing more? Are we to lose sight of this deed, of which the Company claim the benefit? Have they not thereby contracted themselves out of that provision of the act of parliament? Have they not, by the mode in which they have dealt, and claim to deal, with this petitioner, by their conduct and their contract, opened the necessity of taking the account? They have taken by two trustees not within

this jurisdiction in bankruptcy, upon the basis of an account, property, of which they are entitled to receive the rents and profits, and to a sale: then I ask, how can you, having contracted to that extent, set up the provision of this act of parliament? Can we in bankruptcy do justice to this petitioner against you, insisting upon the benefit of this deed, and at the same time upon the privilege of this act of parliament? And must we not, on this state of things alone—a relation of partners—an account in which there is property outstanding, as security, in persons against whom there is no jurisdiction—must we not, were there nothing more in the case, have suspended the advertisement in the Gazette, restrained all proceedings under the fiat, directed the petition to stand over, and reserved the further directions and the costs, until after the property had been realized and the balance ascertained, without prejudice to any other creditor, if any, to take out and prosecute a fiat, should any other creditor, if any, be so disposed?

Now, in this way, and so far dealing with the case, I have put out of it the circumstances, that the petitioner asserts, that he is solvent—not only solvent to the full extent of any thing that may be due to the petitioning creditor, but that he has no other creditor; because, strictly speaking, his solvency, and his having no other creditor, though circumstances not inoperative in the further view of the case, would not be a necessary ingredient, in founding the kind of order to which I have so far adverted;—but, proceeding further, and taking those circumstances into consideration, with a view to giving them such weight as they deserve,—the order would have directed the proceedings to go on till the choice of assignees, thereby to ascertain two things: first, whether

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there is any other creditor; and, secondly, whether this fiat, going on to the choice of assignees, could administer the rights of the parties in a bankruptcy, as in a bankruptcy they ought to be administered. Now, it does so happen, that, without the Court having been called upon to interfere, the bankruptcy has gone on to and arrived at that state, to which, upon the circumstances already noticed, it would have been expedient to have brought it; and we find it realizing these propositions: the petitioner may be assumed to be solvent—no other creditor will come in—no assignees have or can be appointed—this fiat cannot be worked as a fiat ought to be; and therefore, upon the principle of this Court in bankruptcy, we are called upon to say, that it must be superseded.

Now, if this would have been the right conclusion, upon the case thus stated, by how much more is it not strengthened by the conduct of the respondent? He institutes a suit in the Exchequer—a suit properly founded upon the relation in which the parties stand—he admits there is a subsisting account, and he desires it to be taken, and the securities to be realized, in a Court having complete jurisdiction over the whole subject, both as against the parties in whom the property is, and the property itself, competent to carry into effect the sale of the property under its decree—this Court having jurisdiction over neither one nor the other; while in that suit, if the plaintiff chooses, a decree may be had to-morrow. Now I ask, is the state, in which I find these parties, one in which, if the plaintiff in equity had commenced an action at law, the defendant in equity could do there nothing more than put him to his election? I put the equity against this

fiat upon this—and upon this I am willing that my opinion should stand, or fall,—would not the defendant in the Exchequer have been entitled to file his cross-bill?—would he not have been entitled to say, this is a subject not only properly within, but which you have, to the extent of a suit now ready for hearing, brought within the jurisdiction of a Court of Equity—let the accounts be taken—let the property be realized, as you have prayed, and I now pray and offer—and let your action be enjoined? I think he would be entitled to that injunction; and if entitled to that injunction, would he not also have been entitled to restrain those proceedings, which, as proceedings in the action, have occasioned and ended in the present and only act of bankruptcy? Would he not, in short, have been restrained from occasioning such an act of bankruptcy? Unless I am sound on that conclusion, I am not aware of any *equity*, upon which I could supersede this fiat.

But that is not all. I have still to ask myself, whether, independently of general equity, the fiat has been taken out for objects, and can be worked for the legitimate purpose and due effect, of a fiat. Now, it ought not to be lost sight of, that this is not a case in which a party, proceeding in a suit, discovers a pre-existent act of bankruptcy; or where the bankrupt becomes so, independently of any impulse, or rather compulsion of the petitioning creditor. He gives the defendant no indulgence—he presses him to put in his answer—he forces the pleadings in the cause to a point, from which, when he drives the defendant into bankruptcy, he himself is receding, and for no other object, that I can discover, than thus to get the management of the account, and the sale of the property into his own hands; for who is

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to check or control him? Now when he thus, by his own act occasioning the act of bankruptcy, resorts to the fiat, does he tender the reciprocity which the bankrupt is entitled to? As this property is to be realized, how is it to be done in bankruptcy? And although I am anticipating difficulties which might not arise, yet it is fairly put as an argument, where the party tells us he stands upon his legal right; and the question is, how rights can legally be dealt with. Suppose it to turn out, that by the realized proceeds of the security, and upon the balance of accounts, the petitioner is a creditor; how is he to get that in the bankruptcy? When, therefore, I am told, that you are only taking your legal remedy, and abandoning your equitable rights, where is the reciprocity? How do the creditors, or how does the bankrupt, get their legal or their equitable rights under such a fiat? Nay, how is the fiat to be worked at all? Not only has there been one, but two meetings for the choice of assignees; and we are told, by the record upon the proceedings, that assignees cannot be chosen, because there is no person that can choose them, and no person that can be chosen. When we parted with this case upon a former occasion, I intimated that it must go to a choice of assignees, in order to afford the Court the means of regulating its interference by what took place at the meeting. A petitioning creditor, who takes out a fiat, pledges himself that there shall be assignees chosen; and if assignees cannot be chosen, or will not accept the office, the Court, where it can be done, with justice to the bankrupt and the estate, will throw upon the petitioning creditor himself the office of assignee, rather than supersede. But can that be done in this case? Is not the petitioning creditor utterly disqualified? Who is to

check him in taking the accounts,—in dealing with the property? Can the Court arm the bankrupt himself with the authority and trust of an assignee? Has the Court ever done, or in any case ever thought of doing so? Can it do so, working this fiat as a fiat in bankruptcy? And if it could do so, would more be thus accomplished than to supply a very inadequate substitute for the suit now pending in the Exchequer?

I cannot part with the case, without noticing that an application was made to the Court, that the petitioning creditor, according to a practice now established, might be at liberty to take his security at a certain amount, and to prove and vote in the choice of assignees for the difference;—an object probably in his contemplation at the time of his issuing this fiat, and which would have placed him, or his nominee, in the position of assignees, and would have given him the whole control over the bankrupt and his property. This was certainly a case, in which no such order ought to have been made; and, in point of fact, if it had been made, and the result had been, as already surmised, it would have just left the matter where it was before; for the assignee so chosen must inevitably have been removed.

I have now brought to the validity of this fiat, all the tests by which, in my opinion, it ought to be tried; and I cannot say, that if I could find out a way in which this bankruptcy could be prosecuted, I feel any inclination to aid the petitioning creditor in his difficulty. I cannot but consider it as a very harsh proceeding against this man, to drive him, as they have done, to an act of bankruptcy, and to make it the foundation of a fiat against him. I almost regret, as far as I may express regret, that I consider this fiat as valid in point of law. But I have not

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a moment's hesitation in saying, that it is one which, upon each of, and, *à fortiori*, upon all the principles to which I have adverted, this Court is bound to supersede; although, to use the language of Lord *Eldon*, "it stood upon a rock."

Sir JOHN CROSS.—There are two principal questions in this case: 1st, whether Mr. *Hall* has committed an act of bankruptcy; 2ndly, whether, if so, the fiat ought notwithstanding to be superseded.

The first of these questions, though not essential to the conclusion to which I am about to proceed,—yet having involved in its discussion other questions materially affecting the constitution of this Court, as well as the whole system of jurisprudence within its peculiar province;—I feel it to be my duty to advert to them, and to endeavour to remove the doubts which appear to prevail on those subjects.

The alleged act of bankruptcy is the one created by the new act of parliament for abolishing Imprisonment for Debt, the 8th section of which provides, that if any one or more creditors shall file in the Court of Bankruptcy an affidavit of debt, and of his or their belief that the debtor is a trader, then, unless the debtor shall pay or give security for the debt within twenty-one days, he shall be deemed to have committed an act of bankruptcy on the twenty-second day. In the present case, the default of the debtor is admitted; and the remaining question is, whether the affidavit is sufficient to constitute the act of bankruptcy. This is a pure question of law, and must be determined here precisely as in any other Court of Law, upon the facts apparent on the face of the affidavit, without refer-

ence to any extrinsic evidence whatever. Two objections have been made on the face of the affidavit: 1st, That it was not *taken* before the proper officer; and, 2ndly, That it was not *made* by the proper party. As to the first objection, the affidavit purports to have been taken before a Master Extraordinary in Chancery. Now, the 8th section directs how it shall be *filed*, but is silent as to how it shall be taken and *sworn*. This clause is a literal transcript of the 10th section of the General Bankruptcy Act, changing only the *place* of filing; and both clauses, therefore, are in this respect equally defective. But as it is obvious that the legislature, in both cases, intended that the affidavit should be taken before somebody, we must presume it was intended it should be taken in the usual way. And in this instance, it was taken before one of a class of officers expressly authorized by the general act to take the affidavit of the petitioning creditor on the commencement of the proceedings, and also of any other creditors to prove their debts before the Commissioners. And, by the 38th section of the act constituting this Court, the same officers are authorized to take affidavits in all matters within its jurisdiction. I am therefore of opinion, that this affidavit was properly taken before a Master Extraordinary. A contrary determination would render the 8th section of the new act a dead letter, and nearly annihilate the whole system of bankruptcy, which has hitherto mainly depended on the fact of debtors keeping out of the way to avoid arrest; a fact likely to be of rare occurrence in future; for which reason this new act of bankruptcy is substituted in its stead.

As to the second objection, that the affidavit was not

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made by the proper party. The act requires it to be made by one or more creditors. Now, this affidavit purports to be made by an agent of creditors; which is consequently irregular, unless authorized by some other law. But it is said to be so authorized by the act of 7 Geo. 4. c. 46., relating to Banking Companies; the 9th section of which empowers any public officer, *nominated* pursuant to the act, to commence and carry on proceedings in bankruptcy, on the behalf of any Company "*carrying on business pursuant to the act.*" But this affidavit does not describe the officer as *nominated*, nor the Company as *carrying on business* pursuant to the act; but it describes the agent, as a registered officer, duly authorized to sue on the behalf of a Company, *united for that purpose*. In this respect, therefore, the affidavit is undoubtedly defective; but whether so defective as to invalidate the act of bankruptcy, it is not now necessary for me to determine. It is sufficient, for the present purpose, to say, it is very doubtful whether it could be sustained in an action at law; and that the rights and interests of the parties ought not to be left entirely dependent on that uncertainty, if it can be avoided.

A third objection has been made relative to the affidavit, but not one apparent upon the face of it; viz., that it does not appear to have been *filed* pursuant to the act. As to the *place of filing* the affidavit, the 8th section of the new act requires it to be filed "*in Her Majesty's Courts of Bankruptcy,*" and then requires the security to be taken by a Commissioner of the *Court of Bankruptcy*. And it has been said at the bar, that there is a Court of Review, and a Court of Commissioners; but

that the Court of Bankruptcy has no existence. My first impression was, that this variance in the words of the act was a mere clerical slip, or misprint; but, upon further consideration, I think it has arisen from the confusion occasioned by an apparent division of the Court of Bankruptcy into several distinct Courts of Judicature. The act 1 Will. 4. c. 56., under which this Court was first constituted, provides for the establishment of a Court, which, like the Court of Exchequer, is to be a Court of Law and Equity, to be composed of judicial, administrative, and ministerial officers; and it has assigned the judicial duties to the Judges, the administrative to the Commissioners, and the ministerial to the Registrars. But the act constitutes the whole one integral Court of Record, under the name of "*The Court of Bankruptcy*;" and consequently all official acts done in any of its several departments are acts of Court, as is the case with all the other Courts at Westminster. The statute then gives to the judicial branch of the Court the appellation of *The Court of Review*, in contradistinction to the other branches,—and separates the administrative branch into two distinct boards, under the name of Subdivision Courts. But these are merely nominal distinctions. The act has expressly incorporated these two boards within the Court itself, but has not so incorporated the several provincial boards of Commissioners. These are, nevertheless, under the general purview of the act, placed within the jurisdiction as officers of the Court. Their powers and duties are the same as those of the two Subdivision Courts; except that, in the latter, one Commissioner may execute most of the duties, which are confined, as well

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in the Provincial as in the Subdivision Courts, to the execution of fiats, within their respective and local districts. The business of the new establishment went on for a few years, without any thing occurring to bring its constitution in question; till it happened that one of the Commissioners for the London district imposed a fine upon a solicitor, for sending him a disrespectful letter relating to the execution of his office. The solicitor complained to the Court of Exchequer, and the fine was discharged, that Court being of opinion, that the Commissioner had no authority to impose it; and it declared that the Judges of England, sitting singly in their chambers at Serjeant's Inn, did not exercise that power, and intimated that the matter ought to have been referred to this Court, in the same manner as the Masters in Chancery submit contempts committed towards them to the Lord Chancellor. By that decision, any doubts that might have arisen, as to the existence of several independent Courts, seemed to be set at rest. Yet, strange to say, the reporter of the case alluded to, which is that of the *King v. Faulkner*, in 2 Mont. & Ayr., says, in a note, that in consequence of that decision, a clause was afterwards introduced into the act for appointing an Accountant in the Court of Bankruptcy. That clause recites, that *doubts* had been entertained whether the Court of Review, and the Subdivision Courts, had been effectually made Courts of Record; and it thereupon declares and enacts, that they shall be and have been respectively Courts of Record, and that every single Commissioner sitting alone, in the execution of his office, shall have all the *powers*, &c. of a Court of Record.

If the clause had stopped here, it would seem intended to give the power disallowed by the Court of Exchequer; but it is followed by a proviso, prohibiting the exercise of the power to fine, or imprison,—both which are usually considered incidental to all Courts of Record. So that it thus leaves the matter just where it was before, and in this respect the clause seems to be a mere nullity. It was introduced, without the knowledge or privity of the Judges of this Court; at least, I can say for myself, I was not aware of it, or of the existence of the doubts, on which it purports to be founded, until I saw it among the printed acts of the Session. That clause does not extend to the other boards of Commissioners; which, it seems to me, it was at least equally necessary should be constituted Courts of Record. A similar clause was afterwards introduced into the Bill for abolishing Imprisonment for Debt, constituting each of the six London Commissioners a Court of Record, without, however, any such proviso as before, and authorizing the majority of them to make general rules and orders,—which by law then was, and still is the duty of this Court; but that clause was afterwards struck out. These are the circumstances, which appear to me to have raised, instead of removing, doubts, and to have given occasion for the expression of *Courts* of Bankruptcy in the new act. But, though I think they have been productive of some confusion, they do not appear to me to have had the effect, as supposed at the bar, of dismembering and splitting the Court into several independent tribunals; for there is still but one Court of Bankruptcy, of which the Judges, Commissioners, and Registrars, are the constituted officers in

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their respective departments. And I think, that the Court of Bankruptcy, and the Court of Review, are in effect synonymous terms,—like the twofold name of the Court of Common Pleas, and the Court of Common Bench. I am of opinion, therefore, that the proper place for filing the affidavit is the Registry Office at the Court House, in Basinghall Street; where I presume it now is.

I have thought it necessary to advert to these matters, in order to account for what appears extraordinary, that the legislature should have used the expression “Courts of Bankruptcy,” while, in the same clause, it speaks of “a Commissioner of the Court of Bankruptcy;” and because I wish it to be distinctly understood, that in my opinion, neither the Courts of single Commissioners acting alone, nor the Subdivision Courts, constitute independent Courts of Judicature. They are alike branches of one integral Court of Record, of which we are all officers in our respective departments. So much for the *filing* of the affidavit; which, if *made* by a sufficient party (but of that, however, I have great doubts,) I think in all other respects constitutes a complete act of bankruptcy.

And having now disposed of the questions of public concern that have arisen in this case, I offer no opinion on the petitioning creditor's debt; but I proceed to the consideration of the only remaining question, which is the most important one of all to the parties in the present litigation; and that is, whether the fiat ought not to be superseded, as being sued out for purposes wholly foreign to the bankrupt laws? In order to come to a just conclusion upon that question, we must look a great deal in

detail to the circumstances; and it was for the purpose of avoiding that necessity, that I rather wished the Court could have come to a conclusion upon the question of law,—whether there was a sufficient act of bankruptcy; for, if the Court were all agreed there was not, it would have been unnecessary to consider the question I am now upon. Now, what are the circumstances of this case? Mr. *Hall* was one of the Directors of a Banking Company. He was no trader, except as such banker; he owed no debt to any person but on the partnership accounts. Those accounts were disputed between him and his partners. They filed a bill in equity against him, which was the regular mode of proceeding by partners against a partner, for an account; and in order to have all these matters settled,

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Mr. *Swanston*. I beg your Honor's pardon. It was a suit in equity limited to enforcing the security. Your Honor says it was to have the partnership accounts taken.

Sir JOHN CROSS.—If I am not mistaken, the petition states that the bill prayed an account. It was a bill in equity by several partners against one, praying an account, and praying that certain securities he had deposited with them might be rendered available. The Company were the plaintiffs in the suit, and Mr. *Hall*, their partner, was the defendant. The suit proceeded to the filing of the answer, which, from an unfortunate accident of the counsel in the long vacation, not being prepared in due time, the filing of it was enforced by an attachment. The answer was filed; the matter was ready for hearing; the plaintiffs having got so far, it

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occurred to them that they had better take the law into their own hands, by making the defendant a bankrupt under the new act of parliament just then passed ;—and, for that purpose, to file an affidavit of debt to an amount large enough to drive Mr. *Hall* into an act of bankruptcy. Accordingly, they made an affidavit of a debt to the amount of 15,000*l.*, giving no credit for the securities they held, and swearing to a debt of such an enormous amount, that he would be unable to find the requisite sureties for a sum, so far beyond, as it would seem, what he really owed to them on the balance of the account. He was compelled, therefore, by this contrivance of his partners (one of whom was a solicitor, from whose hands he had just before removed the proceedings in another bankruptcy, in which he was himself assignee) to fall into the snare thus set for him, out of which he could not escape, being unable to find sureties for so large a debt ; and for that default, he was made a bankrupt, on an affidavit of a partnership debt. The plaintiffs in the suit carry down the fiat. The first thing they do, when they come to open it, is to apply to the Commissioners for a provisional assignment to themselves, the petitioning creditors,—a thing contrary to all usage. I had formerly pretty long experience as a Commissioner of Bankruptcy ; and in my life I never gave a provisional assignment to a petitioning creditor, especially one to this enormous amount. I have certainly, for one, always refused to do so. It is a well known rule in the appointment of provisional assignees, that there must be some cause for appointing them ; and that cause must, Lord *Eldon* has said, be recorded upon the proceedings of the Commissioners. No cause is shown whatever, in this case, for executing

the provisional assignment; no necessity whatever appears for it; but see what was the effect of it. It gave the plaintiffs in the suit power to seize *instante*, and made them in fact the legal owners of all the estate, real and personal, of the defendant, and gave them the power to turn him and his family out of doors without a vestige of property; all being placed by this strong-handed proceeding entirely at the disposal of his adversary in the suit in equity.

In this state of things, and after the Company had thus got the dominion of all his estate and effects into their own hands, the bankrupt resorts to this Court for a *supersedeas*, and says, "this is my only debt, and it is still *sub judice* in the Court of Chancery, and also in an action at law, and I owe no other debt, except to my present solicitor." The Court thought this was very strange, and paused until the appointed meeting of the Commissioners had passed over, at which creditors were to prove their debts, and assignees were to be chosen. The Commissioners met; they could not stir a step in the execution of this fiat; they sat their hour away, received their fees out of the estate of this unfortunate bankrupt; they had nothing to do; no creditor appeared to prove or claim any debt, no, not even the petitioning creditor himself; and no assignees were chosen; and the prosecution of the fiat broke down altogether.

Now, in this state of things, it appears to me, that this is not a case to which the legislature ever intended that the bankrupt law should be applied. We all know, that the general principle of the bankrupt law is, to obtain an equal distribution of the effects of the insolvent debtor among all his creditors. Now, it is not

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pretended, that there is any equal distribution to be made in this case among creditors; there is no creditor but one, the plaintiffs in the bill in equity, and the partners of the bankrupt. So, without going any further, it seems to me to be quite monstrous, to say that it should be endured, that all this gentleman's property shall be continued as the legal property of his adversary in the suit in equity, and that he shall have no power in the prosecution of that suit to obtain his rights.

It appears therefore to me, that the fiat is not available for the usual purposes of bankruptcy, but has been made available solely to enforce the payment of a disputed partnership debt, by an *ex parte* proceeding, which has placed all the estate and effects, real and personal, of a partner in the hands of the copartnership; whereby he may be compelled to submit to their full demand, without any judgment or decree in the action, or in the suit they have brought against him.

Some doubt at first occurred upon this part of the case, as to whether there was any precedent, to show that the Court ever went the length of disturbing a fiat, which had been established in all its legal incidents, under circumstances similar to the present. Now, there is a case I find in 4th *Vesey*, remarkably similar to the present in many of its circumstances; but when cases depend entirely upon their circumstances, of course you do not find them altogether the same. But in the case of *Ex parte Bowles*, there was a suit in equity between the parties; and there, indeed, it was not the plaintiff in equity, but the defendant, who became the petitioning creditor. He was not satisfied with the progress which the suit in equity was making, and he thought it would

be a better thing to make his adversary a bankrupt; and, accordingly, he did so. Now, without detaining the Court by going through all the circumstances of that case, though there were there many other creditors, the Lord Chancellor held, that as the commission was founded upon the debt of a creditor, who must of necessity gain the whole direction and dominion over his adversary's property, it should not be allowed; and, accordingly, Lord *Loughborough* in that case superseded the commission, with costs, to be paid by the petitioning creditor. What shall be the result of this case, I do not take upon myself to determine, with regard to costs. I only say, I am decidedly of opinion, but with the greatest deference to his Honor, the Chief Judge, that, upon the merits, this fiat ought to be superseded.

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ERSKINE, C. J.—In this case the petitioner seeks to annul the fiat, under which he has been adjudged a bankrupt, on two grounds,—first, that the requisites necessary to support the fiat in law, have not been proved; and secondly, that the fiat has been issued, from motives and under circumstances which call for the equitable interference of this Court, to prevent the abuse of its process. With regard to the legal validity of the fiat, it has been impugned upon three grounds,—first, that there was no trading; secondly, that there was no petitioning creditor's debt; and thirdly, that there was not a sufficient act of bankruptcy.

The objection upon the ground of trading seems to have proceeded upon a misconception of some expression, which fell from the Judges of this Court upon a former petition to supersede a fiat issued against a

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member of a Joint Stock Banking Company. In that case it appeared to the Court, that the party, against whom the fiat was sued out, and which was in fact his own fiat, had purchased shares in a Banking Company, not for the *bonâ fide* purpose of joining in the trade and becoming a banker, but simply for the purpose of enabling a friend to sue out a fiat in bankruptcy, under which his affairs might be settled; and the Court upon that occasion said, that in that case they could not consider that the mere fact of purchasing the shares, where they could see that the intention was not to become a trader, but merely to become a bankrupt, would not support a fiat thus issued out for the bankrupt's own purposes. But it never intended to say, that a shareholder in a Company of this sort did not thereby make himself liable to bankruptcy, or that it would be competent for him to set up, as an objection to a fiat in bankruptcy, that he had not thereby made himself a trader; because the very fact of signing the deed of copartnership for carrying on the business, which the acts of parliament had declared to be a trading within the bankrupt laws, had, as against himself at least, afforded conclusive evidence that he had become a trader. But in this case, where the bankrupt was not only a shareholder, but one of the managers of the business of the Banking Company, it never could be doubted for a moment, that this was a good trading within the bankrupt law.

The next objection is to the petitioning creditor's debt; and this objection is founded on the fact, that the fiat has been sued out by a Company, of which the bankrupt is a member, in respect of a debt due from him to the firm. In ordinary cases, this would be a fatal objection; but the petitioning creditor in this

case relies upon the provisions of certain acts of parliament, by which individuals carrying on business in copartnership as bankers, may authorize certain officers, to be named by them, to sue for them, and, among other provisions, to sue the members of their own firm. Now, the objection to a partnership suing out a commission against a member of their own firm, arises from the nature of the debt, which is due from the one to the whole body. No action at law could ever have been maintained either by the firm, or by any portion of the firm, against a member of the partnership, for any debt due by that member to the whole firm. No action could be prosecuted by the whole firm; because then the debtor would be both plaintiff and defendant,—a thing that is never allowed in an action at law. If the action was brought by the whole firm, then, as a member of the firm, he must have been one of the plaintiffs, and in his character of debtor, he would have been one of the defendants. Neither could an action have been brought by any of the members of the firm, in respect of their portions of the debt due from the one to the other; because that portion, or the portion due to each, must depend upon taking the whole partnership accounts; which Courts of Law never will do, however easily they may be ascertained. And, although it may appear on the face of one or two documents what the precise proportion of each will be,—that task they leave to a Court of Equity. Inasmuch, therefore, as this would have been an equitable debt, only, due from the bankrupt to the firm of which he was a member, there could be no action brought, and consequently there could be no fiat issued out; because the petitioning creditor's debt must be a debt recoverable at law. But

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by the statute which has been cited, of the 1st & 2nd of her present Majesty, chap. 96, amending the former act of 7 *Geo. 4.* c. 46., the legislature has thought it right to enact, that any person now being, or having been, or who may hereafter be, or have been, a member of any copartnership now carrying on, or which may hereafter carry on, the business of banking, under the provision of the said recited act, and may at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the copartnership, or the funds or property thereof, "may sue and be sued by the public officer" appointed under these recited acts. And it goes on to state, "that the person having been and being a member, shall be capable of proceeding against the copartnership by the public officer, and be liable to be proceeded against, by or for the benefit of the copartnership, by such public officer as aforesaid, by such proceedings, and with the same legal consequences as if such person had not been a member of the said copartnership." Without referring, then, to the language of the 7th *Geo. 4.*,—by the force of this statute, coupled with the 4th section, which takes away any right of set-off which such member might have in respect of dividends of shares or profits of the concern, the public officer would have a right to bring an action; and it would necessarily follow, as it appears to me, that he might also petition for a fiat in bankruptcy; for though it has been objected that it had been decided in the case of *Guthrie v. Fisk*, that an act of parliament, authorizing a company to sue and be sued by their secretary, did not authorize that secretary to sue out a fiat in bankruptcy; yet that decision proceeded

upon the language of that particular act of parliament, which expressly confined it to *suing* and *being sued*; and being a private act of parliament, the Court thought they were bound to construe it strictly, and that, under the provisions of that statute, it was obvious the legislature had not intended to extend the power of the secretary to take proceedings in bankruptcy. But here the language is much more extensive, referring not only to all *proceedings in law, or equity*, but to "such proceedings, and with the same legal consequences, as if such person had not been a member of the said copartnership." It appears to me, therefore, that the words of this statute alone remove the objection to a fiat in bankruptcy being taken out for a debt due to the firm; and then, looking back at the 7th Geo. 4. c. 46. s. 9., it is clear that the legislature intended that in all those cases where a partnership might sue, or take out a commission of bankruptcy, the secretary, or the registered officer of a company of this description, was the proper person to institute these proceedings; for the 9th clause says, "that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity, under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership, or otherwise, for recovering any debts, or enforcing any claims or demands, due to such copartnership, or for any other matter relating to the concerns of such co-

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partnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid." Therefore, whatever might have been the effect of this clause, taken by itself, before the passing of the recent statute in the reign of her present Majesty, it appears to me, that, taking the two acts of parliament together, this fiat was well sued out by the registered officer of the Company against the bankrupt, for a debt due from him to that firm.

The next objection is, that there has been no act of bankruptcy. Now, the act of bankruptcy relied on is that created for the first time by the statute which has been alluded to, of the 1st & 2nd of her present Majesty, chap. 110. s. 8.; which enacts, that it shall be lawful for any creditor to file an affidavit in her Majesty's Court of Bankruptcy, that such debt is justly due to him, and so on, and that if the debtor does not, within the twenty-one days, give security to the satisfaction of the Commissioner, it shall be an act of bankruptcy. There is no dispute, that the affidavit made by Mr. *Stubbs*, the registered officer of this Company, swearing to the debt due to the Company from the bankrupt, was filed in the Court of Bankruptcy; nor is there any dispute, that a copy was duly served on the bankrupt, who admitted he did not pay nor secure the debt, as required by the statute. But the objection arises, first, that the affidavit was not sworn before any person authorized to take it; secondly, it does not appear, on the face of the affidavit, to have been taken by any person so authorized; and, thirdly, that it does not appear in the affidavit, that the deponent is a person authorized to make such an affidavit. The affidavit in question

is sworn before a Master Extraordinary in Chancery. Now, as has already been observed, the statute is altogether silent as to the person before whom the affidavit is to be sworn. So it was in the case to which my learned colleague has alluded, which occurred under the 6th Geo. 4. c. 16. s. 10., with reference to the member of parliament; but under that statute it was always considered, that inasmuch as the clause directs the affidavits to be filed in some Court of Record at Westminster, and thereupon to sue the process out of that Court in which the affidavit was made, it necessarily followed, that the affidavit was to be sworn before that Court, or by some person authorized by the Court to take affidavits. It seems to me, that the same inference is fairly to be drawn from the language used in this statute. The legislature having said nothing as to the person before whom the affidavit is to be sworn, and directing it to be filed in the Court of Bankruptcy, appears to me necessarily to lead to the conclusion, that it should be sworn before such person or persons, as were authorized, by the constitution of the Court, to take affidavits in matters coming before the Court, or in matters where affidavits are to be filed in that Court. And then, inasmuch as by the act of parliament (under which this Court of Bankruptcy was constituted) it is directed, that affidavits in matters within the jurisdiction of the Court should be sworn before (among others) Masters Extraordinary in Chancery, it seems to me, that this affidavit was well sworn before the person who signed the jurat. At one time it struck me, there might be an objection; inasmuch as it did not appear *for what purpose* this affidavit was sworn before the Master Extraordinary in Chancery. If the Master Extraordinary had been a mere officer of

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this Court to take affidavits, or if the affidavit had been taken before a Commissioner or Judge of this Court, then it would have been obvious it could have been sworn for no other purpose than that of being used in the Court of Bankruptcy; but, inasmuch as the Master Extraordinary is authorized to take affidavits in Chancery upon matters before the Lord Chancellor, it struck me, that it did not appear on the face of the affidavit, what was the purpose for which this was sworn, and that it might have been difficult to prosecute the party making it for perjury; inasmuch as an affidavit sworn for one purpose, and used for another, is not the subject of indictment for perjury, and a person is only guilty of perjury in the case where it is used, and not in the case for which it was sworn. But, on looking through the cases, it appears to me, that the difficulty has always arisen, not to ascertain the purpose for which it was sworn, but to ascertain whether the person taking the affidavit was authorized to take it in the Court, in which it is filed. It has been decided in many cases, that if the jurat showed the affidavit had been taken before a Commissioner, not stating of what Court he was a Commissioner, the Court in which it was filed would not consider that affidavit as taken in their Court; because there was nothing to show, that it was taken before a Commissioner authorized to take it. But if it appears to have been taken before a Commissioner of that Court, or any Judge of that Court, it would then be considered as properly taken. Now, on looking through the cases, the difficulty is removed from my mind; and I think, therefore, there is no objection to the sufficiency of this affidavit.

But the third objection commented upon was, that it

does not appear upon the face of the affidavit, that the deponent is a person authorized to make such an affidavit. The act of parliament enacts "it shall be made by a creditor or creditors;" and it is said, it nowhere appears in this affidavit, that Mr. *Stubbs* is a creditor. He certainly does not state he was one of the body, in respect of which he institutes this proceeding. If he had been a partner of the firm, of course the usual affidavit made by a partner might have been made, and that would have put an end to the objection. But, inasmuch as he does not state himself to be a member of the firm, it could only be made then by a registered officer, authorized by the act to sue in the name of the Company; and it is said, it does not sufficiently appear upon the face of this affidavit, that he is a registered officer, within the terms of that act of parliament. If this had been a question of pleading, I should have been of the same opinion—that it does not appear, with sufficient certainty to uphold a plea upon a demurrer, that he was the registered officer, within the meaning of this act of parliament. But, though the affidavit is not sworn with all the characteristics of a special plea, it is enough, if it appears upon the face of it generally, that he claims to be a creditor, upon the ground of his being a registered officer of the Company carrying on business under this act of parliament. He states positively, that he is the registered officer of this Company, and that this Company was united for the purpose of carrying on business. But it is supposed, because it does not say, *carrying on business*, but only *united for the purpose of carrying on business*, it is not sufficient. It appears to me it is quite sufficient to support the affidavit, that he institutes this proceeding as the registered officer of the Company

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under this statute; which statute, with reference to it, authorizes the registered officer to sue on behalf of the Company.

I am therefore of opinion, that upon none of these grounds has the invalidity of this fiat been established.

Then, it has been suggested during the argument from the bench, and it has been urged from the bar, in consequence of that suggestion, that the circumstances of this case are such, as to induce the Court, in equity, to supersede the fiat, whatever may be its legal validity. Now, I have the misfortune not to see the case in so strong a light as that in which it has been viewed by my learned colleagues; and if the case were left to my sole decision, I should not have pronounced for this supersedeas on the present occasion: at the same time, there is a great deal in what has been stated in the judgments of the other members of the Court, which induces me to think that probably the most equitable course has been arrived at, in getting rid of this fiat;—because, it does appear to me to have been a harsh proceeding, and that the party has no right to complain of this fiat being taken from him; and there might also have arisen circumstances, under which I should have thought it ought to have been superseded. But it appears to me, that it is rather premature to supersede this fiat, upon the ground of there being no creditor, and no choice of assignees; and I should rather have waited to have seen, that the working of the fiat was so embarrassed by the circumstance of there being no choice of assignees, that it could not be properly prosecuted.

With respect to the other ground of objection, namely, that the party swears himself to be solvent, and that this fiat has been taken out, not for the *bonâ fide* purpose of

recovering this debt, but for the purpose of removing him from the situation of trustee, and from that of assignee under another commission—it does not appear to me, that those circumstances have been made out in evidence. It does not strike me, that, taking all the affidavits together, I could rely on the bankrupt's assertion that he was solvent; because, if he were in solvent circumstances, the provisions made by the statute might have been easily complied with. He was not called upon to pay this debt—he was not called upon to give security for its immediate payment, nor indeed for its payment at all; but all that he was to give security for was, that he should pay such debt, as should be recovered in an action or actions at law, or that he should render himself to prison. Now, if this person had been in solvent circumstances, it strikes me he would have found no difficulty in getting security to that extent, if, as is stated, the debt due from the petitioner had been covered by ample security; but that, as I collect the facts from the affidavits, is denied by the Company;—they deny that the security given is sufficient to cover the debt; and therefore it does not appear to me, upon the ground of solvency, or of the other circumstances, that there is enough to supersede the fiat. It is certainly a strong circumstance, that no other creditor has come in; which might give rise to difficulty and embarrassment in the working of this fiat, and might have induced me to consent to the superseding of it on that ground; but it strikes me, certainly, that it would have been better to have paused, and to have seen whether eventually such would have remained the condition of the fiat; because other creditors, when they found it was to be carried on, might have come in to avail themselves of it. I should have waited until the

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adjourned meeting for the choice of assignees, or until circumstances had shewn that the fiat could not have been prosecuted; but as my colleagues think, that the other circumstances of the case call upon them to pronounce for a supersedeas of this fiat, of course, the order must be that this fiat shall be superseded.

After the COURT had delivered their judgment, Mr. *Swanston* observed, that Mr. *Wightman* and Mr. *Bacon* had not been heard upon a material point, on which they had been stopped by the Court, affecting the equity of the case; and that as this point appeared to have great influence on the opinions of two of the Judges, he prayed the Court to hear Mr. *Bacon* on that point, before the Order was finally pronounced. After some discussion as to the regularity of the proceeding, the Court permitted Mr. *Bacon* to be heard; but Sir *John Cross* and Sir *George Rose* expressed themselves of the same opinion which they had previously expressed.

The ORDER was, that the fiat should be annulled, at the costs of the petitioning creditor.

Note.—On the 29th November 1838, the usual Order was made by the Lord Chancellor, founded on the Order of the Court of Review, to annul the fiat. The respondents, being dissatisfied with the judgment of the Court of Review, applied to one of the Judges of that Court for a special case, for the purpose of appealing against it to the Lord Chancellor; but, in consequence of some difference of opinion between the learned Judge and the respondents' counsel, as to the statements in the special case, the respondents' counsel, on the 14th

December, made an application by motion to the Lord Chancellor, to prosecute the appeal by petition, instead of by special case; when the Lord Chancellor made an Order, that the petition of the respondents should be received, in order that the question of jurisdiction might be brought before his Lordship. A petition was accordingly presented to the Lord Chancellor, not as a petition of appeal, but under the original jurisdiction of the Lord Chancellor in matters of bankruptcy, praying, that his Lordship would discharge his own Order for annulling the fiat, and that a writ of *procedendo* might issue, directing the Commissioners to proceed in the execution of the fiat. This petition was heard by the Lord Chancellor on the 12th January 1839, and stood over for judgment until the 10th April following; when his Lordship dismissed the petition, with costs.

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Ex parte FAIRMAN.—In the matter of LLOYD.

THIS was the petition of an annuity creditor, to be permitted to prove for the value of the annuity, or to have a claim entered on the proceedings, and a fund reserved to satisfy any dividend on the amount of such claim.

The petitioner, and the bankrupt, having formerly carried on business together as partners, dissolved their partnership in November 1827; when a settlement of accounts took place, and the bankrupt signed an account, in which he admitted a balance against him of 1990*l.*

Westminster,
Nov. 21, 1838.

Where the bankrupt, in a deed by which he granted an annuity to the petitioner, acknowledged a certain sum to have been received by him as the consideration money for the annuity, and, in a memorandum also of an account between him and the petitioner, admitted the same sum to be due,

and the annuity was paid by him for ten years, without any impeachment of the consideration; the Court would not reject the right of the petitioner to prove or claim for the value of the annuity, because the bankrupt now made an affidavit that the whole of the consideration money, as stated in the memorial of the annuity, was not advanced by the petitioners to the bankrupts.

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which he proposed to liquidate by granting the petitioner an annuity. Accordingly, a deed was executed between the parties, by which the bankrupt, in consideration of the sum of 1990*l.*, therein expressed to have been lent to him by the petitioner, granted to the petitioner the annuity in question. A warrant of attorney was then given by the bankrupt to secure the payment of the annuity, on which judgment was entered up, and the annuity was regularly paid by the bankrupt, until the fiat issued against him in the present year. The Commissioner rejected the proof, not being satisfied that the consideration, as stated in the deed, was really paid by the petitioner; the bankrupt swearing, that instead of receiving the sum of 1990*l.*, the consideration expressed in the deed, he never received more than 1550*l.* The bankrupt had also made an affidavit, in opposition to the present petition, in which he swore, that when he signed the account, in 1827, he was fully aware of its incorrectness, but he was afraid that the petitioner would take some hostile steps against him, if he disputed the amount of the balance claimed; and that he confided in the honour of the petitioner to make good the payment of the sum of 540*l.*, the amount of the difference between the two sums above mentioned, but which sum he never received; and he added, that he often complained to the petitioner of his being obliged to pay interest for money which he had never received. The assignees had filed a bill in Chancery against the petitioner, to set aside the annuity, on the ground that the real consideration for the annuity was not truly stated in the memorial. The bankrupt had not obtained his certificate.

Mr. *J. Russell*, in support of the petition. After this

annuity has been paid by the bankrupt for ten years, without any objection to its validity, the assignees are now endeavouring to deprive the petitioner of all his rights as a creditor. If they really thought the annuity was void under the provisions of the Annuity Act, why did they not apply to the Court, in which the judgment was entered up on the warrant of attorney, to set the judgment aside? Instead of this, they chose to adopt the more expensive and dilatory proceeding of filing a bill against the petitioner. The only object of the petitioner is to have the dividends reserved on the amount of the value of the annuity, to await the result of the suit in Chancery. He was then stopped by the Court.

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Mr. *Swanston*, and Mr. *Manning*, for the assignees. There are three objections to the proof of the petitioner: 1st, The annuity is void, on the ground of fraud; 2ndly, If there is no fraud, there is a variance in the statement of the consideration in the deed, which renders it equally invalid; and, 3rdly, It is invalid, by non-compliance with the requisitions of the Annuity Act. By the 53 *Geo. 3. c. 141. s. 2.*, the true pecuniary consideration, and how it was paid, ought to be stated in the memorial of the annuity, that is required to be inrolled in the Court of Chancery. Now, we say it plainly appears from the examination of the petitioner before the Commissioner, that no such sum was advanced by him to the bankrupt, as is stated in the memorial. The petitioner, in his examination, states, that some part of the consideration for the annuity was for bills discounted by the petitioner for the bankrupt; and that he had no doubt that he deducted the discount, before he paid the consideration money. For instance, if a bill for 100*l.* had a twelve-

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month to run before it was due, the petitioner only paid the bankrupt 95*l.* Therefore, both the annuity deed, and the memorial were bad, for stating that the whole 100*l.* was paid, when 5*l.* was kept back for discount. If part of the 1990*l.* consisted of interest, as well as money lent, and the deed or memorial only expressed it to be for money lent, the annuity is equally void, for non-compliance with the requisitions of the act of parliament. The bankrupt positively swears, that 540*l.* of the 1990*l.* was never advanced to him, and that he was induced to admit that the latter sum was due, from an apprehension that the petitioner would take some hostile steps against him, if he disputed the account. No doubt, this affidavit contradicts his statement under seal; but, however conclusive an instrument under seal is considered in a Court of Law, it is not so in a Court of Equity.

Mr. *Bilton* appeared on behalf of the bankrupt.

The COURT said, that he could not be heard for the bankrupt on a question of proof, more especially as the bankrupt had not obtained his certificate; but that if he had been served with the petition, he was, of course, entitled to the costs of his appearance; and that if he was prepared with any authorities bearing on the question, he might cite them as *amicus Curiae*.

Mr. *Bilton* then cited the case of *Ex parte Shaw*(a), where it was admitted that an annuity was void, because the memorial did not contain a clause for repurchase, that was inserted in the annuity deed.

(a) 5 Ves. 620.

ERSKINE, C. J.—The question in this case appears to be one of simple fact, namely, whether the 1990*l.*, stated in the memorial as the consideration for the annuity, was actually advanced to the bankrupt, or not. It must be confessed, that the examination of the petitioner before the Commissioner exhibits some instances of weak recollection on his part; and if the case depended upon that alone, the Court might entertain some doubt on the question. But it appears from another document, independently of the acknowledgment in the deed, that the bankrupt admitted that the sum of 1990*l.* was due from him to the petitioner; and the bankrupt, according to his own statement, goes on for ten years paying an annuity, the consideration for which, to the extent of 540*l.*, he now says he did not receive. After the time that has elapsed, and the payments that have been made by the bankrupt during that period, without any steps taken by him to dispute the consideration for the annuity, I think it is rather too much now to say, in the face of the deed, the memorandum at the foot of the account, and the conduct of the bankrupt himself, that the sum he acknowledged to have received was never advanced by the petitioner.

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Sir JOHN CROSS.—I am of the same opinion. It seems to me, that the Commissioner was more impressed with the demeanour of the petitioner on his examination before him, than with the substantial merits of the case. Here, the annuity was granted more than ten years ago; the bankrupt goes on paying it all that time, without any dispute as to its validity; and now, for the first time, he comes and says, “ I put my hand to an acknowledgment for 540*l.* more than I actually received.” It would

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have been, no doubt, a knavish trick on the part of the petitioner, to have acted in the manner imputed to him by the bankrupt; but, after an occurrence that happened so long ago, we must look to the documents that passed between the parties, and their conduct since those documents were signed. By two separate instruments, the bankrupt acknowledged to have received the whole of the money stated to be the consideration for the annuity; and now, on the ground of a lengthened examination before the Commissioner, the assignees file a bill in Chancery against the petitioner, to set the annuity aside. Why, the assignees had nothing to complain of against the petitioner, until the proof was admitted; and, therefore, this was quite an unnecessary proceeding on their part. I think the petitioner is fully entitled to the order he asks.

Sir GEORGE ROSE.—It is somewhat difficult to understand, why the Commissioner refused to admit the claim of the petitioner for the value of the annuity, to be entered on the proceedings, to abide the result of the suit in Chancery. The annuity in this case is merely secured by the covenant of the bankrupt; no property was conveyed or transferred by the bankrupt to the petitioner, to secure the payment of the annuity; but all the bankrupt's property is in the hands of the assignees. What reason, then, had the assignees to file a bill in Chancery against the petitioner, to set aside a deed for fraud, to which deed the bankrupt only is a party? What object was to be answered by such a proceeding? When I heard of this suit in Chancery, I expected that on an account taken, there might be a balance due from the petitioner to the estate; but there is no pretence for any

claim of that kind by the assignees. It appears to me, that the petitioner ought, at all events, if not admitted to prove for the value of the annuity, to have been admitted to claim for that amount. If the case had depended merely on the examination of the petitioner before the Commissioner, that might afford some ground for the Court directing a *vivâ voce* examination of the petitioner, before we made any Order on this petition; but the case does not rest there. There are two instruments deliberately signed by the bankrupt, by which he acknowledged a certain sum to have been received by him of the petitioner, and which he has acted on, without any impeachment of their correctness, for a period of ten years. I make these observations, not only with respect to the right of proof of the petitioner, but with a view to another question I should suggest for the consideration of the Court, namely, whether the petitioner is not entitled to his costs.

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The ORDER was, that a claim should be entered, and a fund reserved to satisfy any future dividends, and that each party should take their costs out of the estate; but that the petitioner should pay the bankrupt the costs of his appearance.

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Where a renewed commission issued in 1816, under which two of the Commissioners were dead, and two had removed to distances of 100 miles and 80 miles, the Court ordered it to be superseded, and the proceedings under it to be transferred to a renewed fiat.

A petition having been presented to the Lord Chancellor, to annul a fiat, is not a sufficient reason for the Court of Review declining to hear a petition, on a collateral matter under the same fiat.

Ex parte HIGGS.—In the matter of *EVANS*.

THIS was a petition to supersede a renewed commission, that had issued under the following circumstances. The original commission was sued out on the 26th May 1815, and the renewed commission on the 21st November 1816. In the present year a renewed fiat was issued, taking no notice of the renewed commission of 1816; and the Commissioners thought, that as the petition for the renewed fiat did not disclose the renewed commission of 1816, they could not act under the present fiat. The grounds on which the renewed fiat issued were, that of the five Commissioners to whom the renewed commission was directed, two were since dead, one Commissioner had gone to live 100 miles off from the place where it was to be executed, and another lived at a distance of 80 miles; leaving only one Commissioner residing in the neighbourhood.

Mr. Bethell, for the assignees under the renewed commission, took a preliminary objection to the Court hearing this petition, on the ground that there was a petition to the Lord Chancellor pending, to annul the present fiat; which was likely to be heard on Saturday next.

The COURT thought, that that circumstance was no valid objection to their hearing this petition.

Mr. Swanston, in support of the petition, said, that the commission of 1816 was in such a position, that the Court would deem it expedient, on that ground alone, to supersede it.

Mr. Bethell, contrà. The petitioning creditor under the renewed commission of 1816 has not been served with this petition, and therefore the Court has no jurisdiction to make any order to supersede that commission. Besides which, various dividends have been declared under that commission, and an important suit in Chancery has been instituted by the assignees under it, which has now gone to the House of Lords. The Commissioners also have made an affidavit, stating that they are willing to act under it.

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The COURT said, that the question was, merely, whether it would be more convenient to work the present fiat, or the renewed commission; and all that they now decided was, that they thought the affairs of the bankrupt's estate might be better transacted under the fiat, on the ground of the removal of the two Commissioners. There was a distinction between superseding an original commission, and a renewed commission, under which only the assets had been administered. The Order would be, therefore, to supersede the commission of 1816, unless the Lord Chancellor should order to the contrary, on the petition now pending before him; and to transfer the proceedings under that commission to those under the present fiat.

Ordered accordingly.



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A joint creditor can prove against the separate estate, where there is no joint estate, and no solvent partner; notwithstanding the estate of a deceased partner may be solvent.

It is not a sufficient reason for expunging such proof, that there was a partner actually solvent at the time it was made, if he became insolvent shortly afterwards.

Quere, whether the rule on this subject applicable to partners applies to persons who are not partners, but merely joint contractors.

Ex parte JOHN BAUERMAN and FRANCIS CHRISTIE.—In the matter of JAMES LOMAX.

THIS was a petition of two creditors of the bankrupt, to expunge a proof, under the following circumstances :

By indentures of lease and release, and assignment, bearing date the 12th and 13th May 1834, and made between one *Thomas Hughes*, paper manufacturer, of the first part; *Edward Hamer*, *William Dakin*, the bankrupt *James Lomax*, *Patrick Magee*, and *William Dean*, of the second part; and the several other persons whose names and seals were thereunto subscribed and affixed, being respectively creditors of *Thomas Hughes*, of the third part; *T. Hughes* released and assigned all his real and personal estate and effects to *Hamer*, *Dakin*, *Lomax*, *Magee*, and *Dean*, upon certain trusts therein contained for carrying on the business of *T. Hughes*, and for sale and appropriation of the proceeds, for the benefit of *Hughes's* creditors.

By virtue of these deeds the trustees carried on the business of *Hughes*, and in the course of such dealings, on the 27th May 1834, opened a banking account with the Northern and Central Bank of England.

On the 4th September 1834, a fiat in bankruptcy issued against *Thomas Hughes*, on the petition of *James Lomax*, under which *Hamer*, *Dakin*, *Lomax*, and *Magee* were chosen assignees.

The trustees continued to carry on the trade of *Hughes*, up to the time of the issuing of the fiat against him, and up to the choice of assignees; after which, the assignees under his bankruptcy carried it on, and the Northern and Central Bank were appointed bankers to the estate.

Hamer, Dakin, Lomax, and Magee, either as trustees, or as assignees under the bankruptcy, became indebted to the Northern and Central Bank in a large sum of money upon their banking account with the Bank, in respect of carrying on such trade.

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On the 22d April 1835 an Order was made, on the petition of certain creditors, for the choice of new assignees of the estate of *Thomas Hughes*; but *Hamer, Dakin, Lomax, and Magee* were to be at liberty to continue in possession of the property, and to carry on the business. In pursuance of this order, a meeting was held for the choice of new assignees, and *Richard Pordrell Hobson* was chosen sole assignee, in the room of the four who were removed.

On the 25th April 1835 *Dakin* ceased to have any thing to do with the business, and assigned over to *Lomax* all his interest in a debt of 385*l.*, proved by him against *Hughes's* estate, and also in an advance of 500*l.* made by him towards carrying on *Hughes's* business.

On the 16th July 1836 *Hamer* died, leaving very considerable real and personal estate; and in August following his executors assigned over to *Lomax* all their interest in the estate of *Hughes*.

Magee afterwards disposed of his interest in the estate of *Hughes* to *Lomax*, who thus became the sole legal owner of the property of *Hughes*; the Northern and Central Bank having notice of all these arrangements.

On the 21st February 1837 a fiat was issued against *Dakin*, on the petition of the Northern and Central Bank, under which the Bank proved a debt of 3970*l.*, as owing to them from *Dakin* jointly with *Hamer, Lomax, and Magee*; the large amount of which debt

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enabled the Bank to elect one of their public registered officers to be sole assignee.

On the 11th April 1837 a fiat was issued against *Lomax*, under which the Bank proved a debt of 3951*l.*, as owing to them from *Lomax*, jointly with *Hamer*, *Dakin*, and *Magee*. The amount of this proof also enabled the Bank to elect two of their public registered officers to be assignees of *Lomax*'s estate, who took possession and disposed of such of the property of *Thomas Hughes*, as remained in the hands of *Lomax*; and the Commissioners were about to meet to declare a dividend.

The petitioners had proved a debt of 290*l.* against the estate of *Lomax*, and they claimed for a further debt of 400*l.*; and they, together with the other creditors, who had proved debts to the amount of 2000*l.*, protested against the Bank being admitted to prove against *Lomax*'s estate; but the Commissioners, notwithstanding, admitted the proof.

On the 15th April 1837, which was after the respective bankruptcies of *Dakin* and *Lomax*, the Bank filed a bill in the Exchequer against the executors of *Hamer*, and *Dakin*, *Lomax*, and *Magee*, and the assignees of *Dakin* and *Lomax*, for a discovery and account of the assets of *Hamer*, with the view of obtaining payment of the debt alleged to be due to the Bank from *Hamer*, *Dakin*, *Lomax*, and *Magee*.

The petitioners alleged, that the estate of *Hamer* was more than sufficient to satisfy all his debts, including the joint debt due to the Bank.

On the 1st April 1837, after the Bank had proved against *Dakin*'s estate, they brought an action at law against *Lomax*, *Magee*, and *Dakin*, for the recovery of the same debt; in which action a *nolle prosequi* was

entered as to *Lomax*, judgment by default was obtained against *Dakin*, and the Bank recovered a verdict and judgment against *Magee* for the sum of 42711.

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On the 12th April 1838, a fiat was issued against *Magee*, under which the Bank proved the amount of this judgment.

The petitioners alleged, that at the time the proof was made by the Bank under the fiat against *Lomax*, the estate of *Hamer*, as well as *Magee*, were both respectively solvent; and that the Bank might have resorted, and did afterwards resort to their estates, by means of the action at law and suit in equity, for payment of their alleged debt; and that the estate of *Hamer* was still solvent.

The prayer was, that the Court would declare the Bank not entitled to receive a dividend upon the debt proved against *Lomax's* estate; that the proof of the Bank might be expunged, and that the Commissioners might be ordered to make a dividend of *Lomax's* estate amongst his separate creditors, to the exclusion of the Bank; that there might be a fresh choice of assignees, and that the meetings advertised for the audit and declaring a dividend, might be postponed until after the hearing of the petition; and that in case such meetings should have been held and a dividend declared, the Bank might be restrained from receiving the dividend; and that the costs of the petition might be ordered to be paid out of *Lomax's* estate.

Mr. *Anderdon*, and Mr. *Bethell*, in support of the petition. The 62d section of the Bankrupt Act (6 Geo. 4. c. 16.), which enables a joint creditor to prove under a separate commission, applies only to a joint creditor of an existing partnership firm at the time of the bank-

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ruptcy, and not to one of four joint contractors, who are not partners, but only joint trustees under a trust deed; *Ex parte Morris* (a). The word "partners," in the 62d section, must be construed in the same way as in the 16th and 17th sections, where the same expression is used, and which must be taken to mean existing partnerships at the time of the bankruptcy. Now, although three of these parties are insolvent, the estate of the fourth party, Mr. *Hamer*, is solvent, and able to pay the debt. Then, upon the principle that applies to the case of a solvent partner, the petitioner, who is a joint creditor of the four, cannot prove against the estate of this bankrupt, while there is another available fund. [Sir *George Rose*. I am not aware of any authority which determines, that in the case of a bankrupt joint contractor, the creditor is compelled first to go against the estate of a solvent co-contractor. It is new to me, if the rule has ever been carried to that extent.] The rule is not necessarily confined to partnerships, but is of universal application, and may be applied with equal reason to any case of the administration of assets. A Court of Equity says in all cases, that when a creditor can resort to two estates, and another creditor can only go against one, he shall not prejudice the interests of the creditor who can only resort to one, but shall get what he can first from the other fund; *Gray v. Chiswell* (b). Thus, if there is a mortgagee of two estates, and another mortgagee of one only, a Court of Equity will prevent the first mortgagee from injuring the interests of the second, and will compel him to go first against that estate, to which the other mortgagee cannot resort. And this Court acted upon the same principle in the case of *Ex parte*

(a) Mont. 218.

(b) 9 Ves. 118.

Hartley (a). There a bankrupt, to whom two estates were devised, charged with the payment of legacies, had mortgaged each of them separately; and the assignees sold the estates, subject to the unpaid legacies and the mortgages. One of the estates was sold for 1000*l.* more than the amount of the mortgage money with which it was charged, and which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it. And it was held, on the application of the mortgagee of the last-mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate. In the present case, the debt is merely a joint debt; it is not like the case of a joint and several obligation, where the creditor has a right to elect against which estate he will prove. At the time this proof was made, also, *Magee* was solvent; so that there were then two solvent parties, to whom the creditor could resort for the payment of his debt. In the case already cited, of *Ex parte Morris*, the rule is recognized and acted upon, that a proof cannot be made by a joint creditor against the separate estate, if there is a solvent partner. [Sir *G. Rose*. That case confirms what I have already said, that the rule only applies, where there is a *solvent partner*.] The 104th section of the 5 *Geo.* 4. c. 98., though repealed by the 6 *Geo.* 4. c. 16., shows what the intention of the legislature was in the application of the rule; for it is there enacted, that in all commissions against one of the partners of a firm, where the debt of the petitioning creditor is a joint debt of the bankrupt and any other person, such petitioning creditor shall not receive any dividend out of the separate

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estate of the bankrupt, until all the separate creditors shall have received the full amount of their respective debts. It is true, that *Hamer*, the fourth joint contractor, is dead; yet, as he has left sufficient assets to pay this debt, his death is immaterial. His life, or death, can make no difference. *Hamer's* estate must be considered in the place of a solvent partner. There is another point that may be urged by the other side, namely, that although *Magee* was not insolvent at the time the proof was made, yet if he is now insolvent, it would be useless to expunge the proof on that ground, because he could *now* prove, after the insolvency. But this relaxing of the rule would be productive of great mischief; for unless the rule is to be construed literally and to its full extent, the creditor might be guilty of *laches* in not availing himself, when he could, of a solvent estate, and other interests would be thereby seriously injured. The impediment, therefore, that existed at the time of proof, is an impediment throughout; and the creditor cannot avail himself of the subsequent insolvency of *Magee*.

But, even assuming that the Bank would have had a right to prove against *Lomax's* estate, we submit, that, under the circumstances of this case, they have lost that right. They brought an action against the three surviving contracting parties, *Dakin*, *Lomax*, and *Magee*, and made an arrangement with *Lomax*, that he should plead his bankruptcy; and they accordingly entered a *nolle prosequi* against him. They went on in the action against the two, and obtained judgment, which we contend merged their right against the three. [*Erskine*, C. J. It is provided by the 59th section of the Bankrupt Act, that where any creditor shall have brought an action

against the bankrupt, jointly with any other persons, his relinquishing the action against the bankrupt shall not affect the action against the other persons.] Still, if the judgment against the two merged the right against the three, the bankrupt was released from the debt; for he was only jointly liable with the other co-contractors, and not jointly and separately liable. But, supposing that the respondents can avail themselves of the privilege given by the 62d section, as to the proof of their debt, they bring themselves within the restriction contained in the latter part of the section, which expressly excludes them from any participation in the dividends of the bankrupt's estate.

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Mr. *Swanston*, and Mr. *Bacon*, *contrà*, were told by the Court, that they might confine themselves to the question, whether the principle that applied to the case of a solvent partner was applicable to this case; and also to the fact, whether *Hamer's* estate was solvent, or not, at the time of the proof.

Whether the estate of *Hamer* was solvent, or not, at the time of the proof, his assets can only be the subject of the administration of a suit in equity, and could not be reached by any action at law, that might be brought by the bankrupt against his representatives. The rule, that a joint creditor cannot prove against the separate estate, if there is a solvent partner, does not apply to the assets of a deceased partner. It is founded only on the right of an action at law, which the joint creditor may maintain against the solvent partner. But when the solvent partner is dead, all right of action against him or his representatives is gone. In the case of the death of one of several partners, an action can then only be

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brought by a partnership creditor against the surviving partners. The estate of an individual partner, therefore, who is dead, cannot represent a solvent partner. Consequently, the principle contended for by the other side, is wholly inapplicable to this case.

Mr. *Anderdon*, in reply, admitted that the main question to be determined was, how far the estate of a deceased partner could be considered in the light of a solvent partner; and contended, that if the fund could be in any way reached by the joint creditor, whether by a suit in equity, or otherwise, he could not prove against the separate estate.

ERSKINE, C. J.—The question in this case turns on a rule, that applies only to the administration of assets in bankruptcy, and not to any other cases. At law, the joint creditor of a partnership might, in a joint action, proceed to execution against the effects of any one of the partners. But in the administration of assets in bankruptcy, some rule has prevailed, upon what principle it is difficult to say, that where there is a solvent partner, the partnership creditor can only resort to his estate, and cannot prove his debt against the estate of the bankrupt partner. Now, in the present case, it is clear, that there is no joint property. The only estate that could be considered so, was the estate of *Hughes*; but that is now vested in Mr. *Hobson*, the new assignee under his bankruptcy; the present bankrupt, *Lomax*, and his three co-assignees, having been removed by order of this Court. The debt now sought to be expunged, originated with *Lomax* and his co-assignees, who carried on the business of *Hughes* after his bank-

ruptcy, for the benefit of the creditors; and all the property of *Hughes* was certainly then vested in *Lomax* and his co-assignees; but it was vested in them under the authority of the legislature for a specific purpose, namely, for an equal distribution among *Hughes's* creditors; and long before the fiat was issued against *Lomax*, the whole of *Hughes's* property became vested in *Hobson*, the new assignee.

Then, if these parties, *Hamer*, *Dakin*, *Lomax*, and *Magee*, were to be considered as copartners, by reason of their carrying on *Hughes's* business for the benefit of his creditors, is any one of them a solvent partner? It is admitted, that at the time of the proof, *Magee* was solvent; but he is now insolvent. There would be no use therefore to expunge the proof, on the ground of his solvency, when it might be put on the proceedings again, on the ground of his present insolvency; it would be absurd in the Court to make any such order. Then the only objection to the proof now remaining on the proceedings is, that the estate of *Hamer*, a deceased co-assignee of the bankrupt, is solvent. And this raises the question, whether the estate of a deceased partner is to be considered in the light of a solvent partner. I must own, it seems to me, that as the estate of a deceased partner can only be administered in a Court of Equity, the present case does not fall within the rule, that prevents the creditor from proving against an individual estate, because there is a solvent partner.—With respect to the operation of the 62nd section of the Bankrupt Act, I should not have alluded to that section, if it had not been dwelt on so much in the argument; as there is no doubt, that it is only applicable to existing partnerships at the time of the bankruptcy. I think

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there is nothing in this case to prevent the right of the Bank to prove against *Lomax's* estate.

Sir JOHN CROSS.—I am of the same opinion. The only doubt in my mind was, whether, in substance, the estate of a deceased partner was not the same, as if there had been a solvent partner; but I find no case that goes to that extent. *Ex parte Morris (a)*, that was cited, only determines, that proof cannot be made against the separate estate, where there is a *solvent partner*; and here the parties were not partners, but merely co-trustees and joint contractors. But it is admitted, that in this case there is no joint estate; and I find it laid down in bankruptcy, that where there is no joint estate, and three surviving partners, who are bankrupt, the joint creditor can prove against each separate estate.

Sir GEORGE ROSE.—The only property, that could be considered joint in this case, was the property of *Hughes*; but the whole of that is now vested in the assignee under his bankruptcy. The distinction between a solvent partner and the estate of a deceased partner is, that you can have an action at law against a solvent partner, and get execution against him, but you cannot do so against his representative; the right of action, in case of his death, being only maintainable against the surviving partners.

Petition dismissed. Costs of all parties out of the estate.

(a) Mont. 218.



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Ex parte PITCHFORTH.—In the matter of PITCHFORTH.

THIS was a petition of the bankrupt, to expunge the proof of a debt for 1000*l.*, the bankrupt contending, that only 100*l.* was due from him to the creditor.

Westminster,
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On a petition by the bankrupt to expunge a proof, he should allege in his petition, that there is a probability either of a surplus, or of his being entitled to an allowance.

Mr. *Spence*, in support of the petition. The question is, whether a bankrupt cannot support a petition to expunge a proof from the proceedings, where there is a probability of a surplus, or at all events, that he will be entitled to an allowance. In the present case, as the bankrupt proposes to strike off so large a sum as 900*l.* from the proof, he is materially interested in presenting this petition, with a view to his allowance.

Sir JOHN CROSS.—It is not alleged in the petition, that there is a probability either of a surplus, or of an allowance.

Mr. *Spence* then applied for leave to amend the petition, if the Court thought the bankrupt's interest was not sufficiently stated in it.

Per CURIAM.—Let the petitioner amend his petition within a fortnight; if not, let the petition be dismissed, with costs, and the respondents have their costs out of the estate (a).

(a) In *Ex parte Coles*, Buck, 256, a petition was presented by the bankrupt, to expunge the proofs of several creditors, which was dismissed on the ground of being multifarious: but it does not appear from that case, whether, or not, the bankrupt alleged in his petition that there was a probability of a surplus, or of his being entitled to an allowance.

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Ex parte GILBARD.—In the matter of MALACHY.

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Nov. 22, 1838.

A party, on his examination before the Commissioners, was compelled by them to produce a book, which was lawfully in his possession, and which, on being produced, the assignees laid their hands on and refused to return. The Court, without entering into the question, as to who had the legal title to the book, ordered it to be delivered up to the party who had the lawful possession of it, when it was produced before the Commissioners.

THIS was the petition of a solicitor, that the assignees might be ordered to deliver up to the petitioner a book of accounts, that was obtained by them under the following circumstances:—

The bankrupt was interested, with several other persons, as joint adventurers in a mine, of which the bankrupt was the manager, and kept the accounts of the concern in the book in question. An action having been brought against all the co-adventurers, they employed the petitioner to defend it; upon which a Mr. *May*, one of the partners in the mines, obtained this book from the bankrupt, and delivered it to the petitioner for the purpose of preparing a defence to the action; and the book was in his possession at the time of the bankruptcy of *Malachy*. Mr. *May* was summoned before the Commissioners, to be examined touching the affairs of the mining partnership; and, in the course of his examination, was required to produce this book; which, on his making some hesitation in doing, the Commissioners threatened to commit him, if he did not go home and bring back the book. Under this compulsion, the book was produced by *May*, when the assignees got possession of it, and refused to return it; upon which the petitioner applied to the Commissioners to order it to be returned to him; but they said, they had no power to do so.

Mr. *Swanston*, in support of the petition. As the book in question belongs to the Mining Company, and the assignees have got it into their possession by an abuse of the authority of the Commissioners, the Court

will not hesitate to order it to be restored. It was produced before the Commissioners merely for the purpose of the examination of Mr. *May*, and the Commissioners had no authority to deal with it for any other purpose.

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Sir JOHN CROSS.—You appear to have made out a sufficient *prima facie* case, as is required of the plaintiff in an action of trover at law. Having proved a lawful possession of the book by the petitioner, and a taking and conversion of it by the assignees, you may leave the other side to prove, if they can, a better title to it.

Mr. *Bethell*, for the assignees. Upon the statement contained in the petition, *May* should have been the party to present this petition, as being the part-owner of the book, and not Mr. *Gilbard*, the petitioner, who is only the solicitor of *May*, and claims a mere lien on it in that character. The book was kept by *Malachy*, as the manager of the mine, and all the accounts which are entered in it are in *Malachy's* hand-writing. The book, therefore, belongs to the joint adventurers in the mine; and the solicitor of one has not a lien on it, as against the others. [Mr. *Swanston*. The petitioner was employed by all the co-adventurers to defend the action that was brought against them, and the book was delivered by their authority to the petitioner.] The statement in the petition is, that *May* employed the petitioner to defend the action, and not the adventurers. *May*, in fact, requested *Malachy* to lend him the book, and then handed it over to the petitioner. If the Court look at the case, as the Commissioners looked at it, that is, merely as a question of property, then *Gilbard* has un-

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questionably no right to the book ; for it was only lent to him, and he could therefore have no property in it.

Mr. *Swanston* was not called on to reply.

ERSKINE, C. J.—Without entering into any question, as to who has the legal title to the book, but looking at it only as a document produced by a party under examination before the Commissioners, it seems to me, that the assignees have wrongfully possessed themselves of the book. Mr. *May* was compelled by the Commissioners to produce it, when he was examined before them; and when the purpose was answered for which it was produced, it ought to have been returned to him. Is it not always usual, when a document is produced in evidence under the compulsion of any legal tribunal, that after it has been inspected and examined by the Court, it is returned to the party who was compelled to produce it? The circumstance, of the Commissioners having made no order for its restoration, does not amount to a sanction of the retention of it by the assignees. I am of opinion, that the book should be restored, and that the assignees should pay the costs of this petition.

Sir JOHN CROSS.—I entirely agree with his Honor, the Chief Judge. The Commissioners threatened to commit Mr. *May*, if he did not go home and produce the book. What right had they to utter such a threat? Mr. *May* was not summoned to produce the book, nor served with a *subpœna duces tecum*. It has been said, that the petitioner has no legal property in the book, and therefore has no right to present this petition. But, put the case of a party who is arrested in the course of

his attendance on the Commissioners, in obedience to their summons, and who is protected *eundo et redeundo*. On an application to the Court above, for his discharge, the Court does not enter into the merits of the action. So, here, we have nothing to do with the title of the different claimants to the book, but have to look merely to the rights of the party who had it lawfully in his possession. The production of it appears to have been required, under some pretext, by the assignees, for the purpose of getting it into their own possession. The Commissioners, perhaps, had no authority to order the assignees to restore the book, when they had thus wrongfully possessed themselves of it; but this Court has such authority; and therefore the assignees should be peremptorily ordered to return it to the party, out of whose possession it was so unfairly taken.

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Sir GEORGE ROSE.—The question is, whether the book is essential to the prosecution of the fiat, so as to form part of the proceedings under it. There is not a suggestion of that kind in the case; and therefore the book ought certainly to be restored to the party, who was lawfully possessed of it, when it was required to be produced before the Commissioners.

The ORDER was, that the book should be immediately delivered up to the officer of the Court, who should retain it in his hands for a fortnight, and should furnish the assignees with a copy, or extracts from it, if required, at their expense; and that the assignees should pay the costs of the petition.

1838.

*Westminster,*  
Nov. 23, 1838.

Where the bankrupt had been committed by the Commissioners, for not answering satisfactorily, and was desirous of being examined before them again; the Court, under the special circumstances of the case,—namely, that the bankrupt had been laying in prison twelve months, and was in a state of perfect destitution,—ordered him to be brought up, at the expense of the estate.

Ex parte CROSSLEY.—In the matter of CROSSLEY.

THIS was the petition of the bankrupt, who had been some time in custody under a commitment of the Commissioners, to be brought up before them for further examination, at the expense of the estate. The fiat issued against the bankrupt on the 27th January 1837, and was directed to Commissioners at Huddersfield, in Yorkshire; who, on the 21st December 1837, committed the bankrupt to York Castle, for not answering satisfactorily, on being examined by them touching his estate and effects. It appeared, that the bankrupt had been on two other occasions committed by the Commissioners, for not giving a satisfactory account of his affairs, and had been twice indicted for perjury and concealment of his property. The bankrupt now said, that he was desirous of tendering an explanation, and perfecting his accounts, and had applied to the assignees to call another meeting of the Commissioners for that purpose; but that they refused to do so, leaving him at liberty to proceed at his own expense. Upon application to the solicitor to the fiat, he required a deposit of 20*l.*; as York Castle was distant forty miles from Huddersfield, and the expenses would be considerable. The bankrupt alleged by his petition, that he was wholly unable to pay any portion of such expenses, or give security for them; his brother, who had assisted him on a former occasion, being no longer in a condition to serve him. He further stated, that he was lying in prison in a state of destitution, subsisting only on the charitable assistance of some of his fellow-prisoners, and that he had contracted a debt of 1*l.* 10*s.* for the use of half a bed, at the rate of 1*d.*

per night. It appeared, that the assignees had assets to the amount of 2000*l.* in hand.

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Mr. *Swanston*, in support of the petition, said, that he was not prepared to enter on a justification of the bankrupt's conduct; but he thought that, under the exigencies of the case, the assignees, who had assets in their hands to so large an amount, ought not to refuse their assistance; especially, as they were cognizant of a sum of 800*l.*, for which the bankrupt was unable to account; and yet they suffered him to be committed, without rendering him the benefit of their information.

Mr. *Bethell* appeared for the assignees.

The COURT said, that in consequence of the bankrupt having already been brought before the Commissioners at the expense of the estate, he was not perhaps entitled to more than an opportunity of appearing before them again, leaving the payment of the expenses to be dependant on his subsequent conduct, and the result of the examination. Considering, however, the destitute condition of this man, and his lengthened imprisonment, it would be hard to refuse him an opportunity of emancipating himself from his confinement. The commitment appeared to have taken place under some confusion, which more deliberate proceedings might perhaps remedy. The Court would, therefore, give the bankrupt leave to be brought up before the Commissioners again, at the expense of the estate; at the same time, it had no reason to doubt that the Commissioners had acted perfectly right, and it would give no opinion as to the validity of the commitment.

1838.

*Westminster,*  
*Nov. 23, 1838.*

Order as to  
payment of un-  
claimed divi-  
dends by the  
executrix of an  
assignee.

Ex parte RAIKES.—In the matter of TUKE.

**THIS** was a petition of the executrix of the surviving assignee, to be permitted to pay certain unclaimed dividends into Court, in discharge of her liability as executrix.

The COURT granted an order as to the payment of the dividends into Court; but declined to order a release.

*Westminster,*  
*Nov. 26, 1838.*

Ex parte FORD.—In the matter of FORD.

A solicitor  
may take out a  
fiat as petition-  
ing creditor, on  
the amount of  
his bill, before  
it is taxed; but,  
if after taxation  
it is reduced  
below 100*l.*,  
the fiat will be  
annulled.

*Semble*, that  
where the re-  
quisite ingre-  
dients to sup-  
port the fiat are  
sufficient on the  
face of the pro-  
ceedings, and  
the bankrupt is  
furnished with  
copies of the  
depositions, and  
has notice that  
they will be  
read, on the  
hearing of his  
petition to an-  
nul the fiat, the  
bankrupt is  
bound to offer  
some evidence  
in contradiction of the depositions, before the respondent can be called upon for evidence to confirm them.

**THIS** was the petition of the bankrupt, to annul the fiat, for want of all the requisite ingredients to support it.

Mr. *Swanston*, and Mr. *Teed*, in support of the petition, launched the case by reading an affidavit of the bankrupt, stating, that he had committed no act of bankruptcy; that he had not been a trader since the year 1833; and that if he had contracted any debt with the petitioning creditor since that period, it did not amount to 100*l.* They then called on the other side to prove the affirmative of the issue.

Mr. *Spence*, for the petitioning creditor, said, that the bankrupt had been furnished with copies of the depositions in the proceedings, with notice that they would be read on the hearing of the petition; and he therefore objected to give any further proof of the requisites,

bound to offer some evidence in contradiction of the depositions, before the respondent can be called upon for evidence to confirm them.



until some more satisfactory evidence had been offered by the other side, in contradiction of the depositions on the proceedings.

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Foord.

Sir GEORGE ROSE thought, that as a good petitioning creditor's debt and act of bankruptcy appeared on the face of the proceedings, and the bankrupt had been furnished with copies of the depositions, and had notice that they would be read, something more should be stated in objection to the fiat, than what had already been done by the counsel for the bankrupt.

Mr. *Spence*, however, being provided with affidavits in confirmation of the depositions, waived the objection, and read his affidavits, which the Court thought established the requisites; and called on the other side to prove the contrary.

Mr. *Swanston* then impeached the validity of the petitioning creditor's debt, as to the amount; contending, that it was founded on an attorney's bill, which had never been taxed; and that if it was taxed, the debt would be considerably below the sum of 100%.

ERSKINE, C. J.—The amount of the debt should be referred to the Registrar, who should inquire whether there was a good petitioning creditor's debt at the date of the fiat.

Sir GEORGE ROSE.—A solicitor may take out a fiat on his bill, before taxation; but if, upon the taxation of it, the bill is reduced below 100%, the fiat will be superseded. But the omission to tax the bill does not impeach his right to sue out a fiat upon the amount of it.

1838.

Ex parte  
Ford.

The ORDER was, that it should be referred to the Registrar, to take the account, and to tax the bill, in regard to the amount of the debt; and a *vivâ voce* examination was directed, as to the other ingredients; and that the petitioning creditor should give notice to the bankrupt, if he meant to rely on any other act of bankruptcy than what appeared on the proceedings.

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HILARY TERM, 1839.

## MEMORANDUM.

IN last Michaelmas Vacation, Sir *James Allan Park*, one of the Judges of the Court of Common Pleas, died; whereupon the Right Honorable *Thomas Erskine*, who had filled the office of Chief Judge of this Court since its first establishment, was appointed to succeed him.

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Ex parte ANN RICHARDSON.—In the matter of  
CHRISTOPHER RICHARDSON.

Westminster,  
Jan. 14, 1839.

The bankrupt, **THIS** was the petition of the sister of the bankrupt, who claimed to be equitable mortgagee of two shares, on the 1st March, deposited with the petitioner certificates of shares in a German Mining Company, for securing a loan of money, with an agreement accompanying the deposit, by which he engaged to complete the transfer of the shares, when required. The petitioner sealed up these documents in a packet, which she entrusted to the bankrupt to keep in his iron safe, for better security, where the same remained until three weeks before the bankruptcy, when it was reclaimed by the petitioner. The bankrupt, long before his bankruptcy, told one of the directors of the Company, that he had deposited the certificates with the petitioner; and this director, on the morning of the 7th December, communicated that fact to the board of directors. In the evening of that day, the act of bankruptcy was committed.—*Held*, that the shares were not in the reputed ownership, or in the order and disposition of the bankrupt, at the time of his bankruptcy.

*Semble*, that the shares in a commercial company, possessing lands in a foreign country for the purposes of trade, are not to be considered as real property.

which the bankrupt possessed in the German Mining Company; praying the usual order. The bankrupt was one of the original shareholders, on the formation of the Company. The property consisted of certain mines in the districts of *Dillenburgh* and *Hardenburgh*, in *Nassau*, and at *Wippenfurth*, in the kingdom of *Prussia*. The produce consisted of silver, copper, lead, and iron; and the property was transferred by deeds, registered in the German Courts, to three English trustees, for the benefit of the shareholders. The bankrupt, in February 1837, applied to the petitioner for a loan of money, on the security of these shares; and was empowered by her to sell 2000*l.* 3 per cent. annuities, the proceeds of which, amounting to the sum of 1800*l.*, he appropriated to his own use, on account of the loan. On the 1st March 1837, the certificates of the shares were handed to her by the bankrupt, together with a memorandum in writing, of the deposit; and these documents were, with those of other property belonging to her, inclosed in a packet, sealed with her own seal, and deposited for safe custody in the bankrupt's iron safe; the petitioner being at the time an inmate of her brother's house. Shortly afterwards, the petitioner went to the continent; and her brother having become embarrassed during her absence, she took up her residence with a friend, on her return to England, which was in November 1837. The packet was then delivered to the petitioner, containing all the documents which had previously been sealed up in it. In the evening of the 7th December, the bankrupt filed a declaration of insolvency, on which a fiat was issued against him.

In support of the petition, it was sworn by Mr. *Hebeler*, one of the directors of the Mining Company, who

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was a friend of the family, that the bankrupt had, some time before his bankruptcy, applied to him for a loan, when he advised him to part with his shares; but the bankrupt told him, they were already pledged to the petitioner for 2000l.; and that at a meeting of the directors, which took place in the morning of the 7th December, the day of the act of bankruptcy, allusion having been made to arrears of calls due on the bankrupt's shares, the deponent mentioned the transfer of them by the bankrupt to his sister; upon which an inquiry was made by the secretary, to know who should be applied to for payment of the calls.

The secretary of the Company, who was examined *vidé voce*, confirmed the testimony of the director; adding, that since the bankruptcy, the calls on the shares had been paid by the bankrupt's assignees; that the mention of the transfer of the shares, at the meeting of the directors, was incidental and casual, and that if it had been a formal notice of transfer, he should have made a minute of it in the books of the Company, which he had not done; that when a shareholder was desirous to transfer any share, it was the custom for him to ask leave of the board of directors for that purpose; and that when that is not done, the shares were treated as in the hands of the original holders. On his cross-examination he stated, that the bankrupt paid the calls on the shares, up to his bankruptcy; that he usually attended the meetings of the shareholders; and that there had been two such meetings between the 1st March and the 7th December.

Mr. *Anderdon*, and Mr. *Bacon*, in support of the petition. There is in this case a clear equitable mortgage,

the consideration for which is beyond dispute, the property of the petitioner in the funds having been sold out and received by the bankrupt for his own use. And the Company had sufficient notice of the deposit of the shares, before the act of bankruptcy; for Mr. *Hebeler* communicated the fact to the board of directors in the morning of the 7th December, and the bankrupt did not file his declaration of insolvency till the evening of that day. But some time before this occurred, Mr. *Hebeler*, one of the directors of the Company, was told by the bankrupt, that he had pledged the shares to the petitioner; and notice to one partner is notice to all. It is settled now, that formal written notice is not absolutely necessary, to prevent the operation of the clause of reputed ownership; for in *Ex parte Harrison* (a) there was only knowledge by the managing director and the secretary of the Insurance Company, of the deposit of the certificates, without any formal notice; and, at the time of the bankruptcy, the shares were still standing in the name of the bankrupt in the Company's books. The same principle was acted upon by the Court of Exchequer in *Smith v. Smith* (b),—where there had been merely a conversation by the equitable mortgagee with one of several trustees,—and by this Court in *Ex parte Bignold* (c). It is true, that in *Ex parte Burbridge* (d), before the Lords Commissioners, it was held, that knowledge of one of the directors to a certain extent did not amount to notice; but it was a strong ingredient in that case, and one on which Lord Commissioner *Shadwell* laid great stress in his judgment, that the certificates of the shares were not delivered by the bankrupt to the petitioner;

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(a) 3 Deac. 185.

(b) 4 Tyrw. 52; 2 Cr. M. & R. 231.

(c) 3 Deac. 151.

(d) 1 Deac. 139.

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while, in the present case, they were delivered to the petitioner nine months before the bankruptcy. It appears, too, that by the rules of this Company no transfer could be made of any shares, without the delivering up of the certificates. The shares, therefore, cannot be said to have been in the order and disposition of the bankrupt; for no transfer could have been made of them, without the delivering up of the certificates, which were in the possession of the petitioner; and, before the act of bankruptcy, the reputed ownership of the bankrupt had ceased.

Sir JOHN CROSS.—The main question is here, whether the bankrupt was the reputed owner of these shares, at the time of his bankruptcy. We have had no evidence yet of reputed ownership,—a fact, which it lies on the other side to establish.

Mr. *Swanston*, and Mr. *J. Russell*, for the assignees. In the first place, admitting the shares in this case to be personal property, there has not been sufficient notice to the Company of the transfer of them to the petitioner. The petition states, that the certificates, which had been delivered by the bankrupt to the petitioner, were put into a box, which was intrusted to the bankrupt for safe custody, when the petitioner went abroad; and that, on her return to England in the second week in November, she requested the certificates to be returned to her; and that they accordingly were returned to the petitioner. But, as to the time *when* that return took place, there is no evidence whatever. It is in evidence, however, that the bankrupt attended the meetings of the shareholders as owner of the shares, and that calls were made on him as a proprietor. The petitioner was examined on this sub-

ject before the Commissioners, when she acknowledged that she never gave any notice to the Company of the deposit of the certificates, and that she had only for a very short time the actual possession of them, before she delivered them to the bankrupt for safe custody. The case of *Smith v. Smith (a)* is distinguishable from this; for there the notice was to one of two or three trustees of private property, and not to one of a numerous body of directors of a public Company. In this case, too, the alleged notice was nothing more than a casual conversation amongst strangers, without Miss *Richardson's* cognizance. In *Ex parte Curtis (b)* it was held, that a casual conversation of an agent of the assignee of a policy of insurance with one of the clerks of the insurance office, where the agent went for the purpose of paying the annual premium on the policy, did not amount to notice of the assignment to the insurance office. So in *Ex parte Burbridge (c)*, the Lords Commissioners expressly decided, that knowledge did not amount to notice.

The question however is, whether this must not be considered real property. The petition speaks of it, as "*immoveable property*," which of course implies property in land, or buildings. Now, that this must be held to be real property seems clear, from what Lord *Lyndhurst* says in his judgment in the case of the *Lancaster Canal Company (d)*. The following is the passage alluded to:—"The Lancaster Canal Company was incorporated by act of parliament in the year 1792. They had the power of purchasing and holding lands, for the purpose of that concern, as a corporation. They held,

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(a) 4 Tyrw. 52.

(b) 4 Deac. & C. 354.

(c) 1 Deac. 139.

(d) 1 Deac. & C. 421.

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and now hold, real property; and the proceeds arising from that concern are proceeds arising out of a real estate. For the purpose of carrying on the concern, it became necessary to raise a certain sum of money. That sum of money was raised by subscription for shares; and the shareholders were entitled to be reimbursed, by the provision of the act of parliament, out of the profits of the concern. As the cause, therefore, thus stands, those profits, which the shareholders are entitled to receive, are profits arising out of the real estates." And they would have been so held in that case, if it had not been, that a clause in the act of parliament expressly declared that they should be considered as personal estate. Now, the German law, to which this property is subject, does not recognize any equitable mortgage of real property. In this respect, the case is precisely like that of *Ex parte Pollard* (a); where there had been the deposit of the title-deeds of a real estate in Scotland, which, by the law of that country, creates no lien on the estate; and it was held by this Court, that this was consequently a mere personal contract of the bankrupt, not affecting the estate, and could not be enforced by a Court of Equity in England. The question in that case has been since re-argued before the Lord Chancellor, on appeal; but his Lordship has not yet delivered his judgment. [Sir John Cross. There is a difference between the two cases. *There* the estate itself was attempted to be mortgaged, by the deposit of the title-deeds. *Here* the beneficial interest, in the share of one of the proprietors in the profits of a Mining Company, is only charged.] The law of Germany admits of an equitable estate, which we contend was conveyed to

(a) 2 Deac. 367.



the bankrupt by the foreign owner of this property. But the German law does not recognize the transfer of an equitable estate, by the mere deposit of the *indicia* of the property.

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Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The question is one of great importance, as property to the amount of 2000*l.* depends upon the result of our decision. The petitioner in this case, at the request of her brother, sold out 2000*l.* stock belonging to her, and lent him the proceeds, amounting to 1800*l.*, on the deposit of the certificates of his shares in this Mining Company. The petitioner sealed up these documents with her own seal, and placed them in her brother's iron safe, for greater security. This transaction took place on the 1st March 1837. With the certificates thus sealed up was another important document also inclosed, namely, a memorandum in writing, which accompanied the deposit of the certificates, and by which the bankrupt undertook to complete the transfer of the shares to the petitioner, when required. The certificates, though in the possession of her brother, were not in his accessible possession. Can it be said, then, that the bankrupt had the order and disposition of the certificates, when he could not touch them, without breaking the seal of the petitioner?(*a*) This leads me to doubt, whether any notice was necessary to be given to the Mining Company of the deposit of the certificates; as

(*a*) If he had broken the seal of the packet, and made away with the certificates, it seems that he would have been guilty of felony, on the same principle as applies to any bailee who breaks open a box entrusted to his care, for the purpose of purloining the contents. See 1 Hale P. C. 505; 2 East P. C. 685; 2 Deac. Crim. Dig. 752.

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the bankrupt had ceased to have any legal power or control over them. The present case differs from the case where a bond is assigned; for there the creditor might receive the debt, without the production of the bond; but here no transfer could be made of these shares, without the production of the certificates. The petitioner had therefore entire dominion over the property, the order and disposition of the certificates being in her, and not in the bankrupt. The act of bankruptcy was committed on the 7th December, in the evening, when the declaration of insolvency was filed; but the directors of the Company had knowledge in the morning of that day, that the certificates were transferred to the petitioner. Was the bankrupt then the reputed owner of the shares at the time of his bankruptcy? It seems to me, that when that took place, all reputation of ownership was extinguished. I am of opinion, therefore, that the petitioner is entitled to have this property sold for her benefit, and to prove for the amount of any deficiency.

Sir GEORGE ROSE.—In all these cases of the transfer of property occurring in the families of bankrupts, it is, no doubt, the duty of assignees to examine carefully into them. In the present transaction, however, nothing could have been more fair on the part of the petitioner, or more honest on the part of the bankrupt. The actual consideration, namely, the money advanced by the petitioner, was equal to the value of the shares; and I should have greatly regretted, if this lady should have been deprived of her property, through her kindness to her brother. As to the argument urged on the part of the assignees, that the certificates of the shares remained in

the custody of the bankrupt, it appears to me immaterial whether, under the circumstances of this case, they were to be considered in his custody, or not; as they had been previously *bonâ fide* deposited with the petitioner, and were only entrusted to the bankrupt's custody under seal. The documents thus sealed up have been identified, as the subject of transfer, for a valuable consideration; and if they had come into the possession of the assignees, this Court would have ordered them to be delivered up to the petitioner. It would have been of no consequence, therefore, if they had not been reclaimed by the petitioner until after the bankruptcy. Certainly, no person wishing to have the benefit of such property ought to omit giving notice of the deposit of the certificates of any shares to the Company. But I apprehend, that the conversation of the bankrupt with Mr. *Hebeler*, one of the directors of the Company, when he said, "I have already deposited the certificates with my sister," amounted to notice,—as being a notice to one of several trustees; and more especially, as the conversation related entirely to the subject of raising money on these very shares. The question of order and disposition is a question of fact in each particular case, and the circumstance already adverted to seems to me enough, to determine that question in this case. The bankrupt was as competent, as the petitioner, to give notice to the Company, in order to complete the security; which, as an honest man, he was bound to do. But there is no difficulty here as to the point of notice; for what took place on the morning of the 7th December amounted to notice to the whole board of directors. Whether, or not, express authority had been given by Miss *Richardson* to Mr. *Hebeler*, to give this notice to the board, she is

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entitled to adopt it, though an incidental notice. And though a bankrupt may be up to the ears in insolvency, notice at any fractional period of the day on which the act of bankruptcy is committed, is sufficient to take the case out of the clause of reputed ownership; if the notice be given before the act of bankruptcy is in fact committed.

Then, it has been contended, that the shares in this Mining Company must be considered as real property; and the Scotch case has been cited to show, that, the mines being situate in a foreign country, the law of which does not recognize any interest in lands by the mere deposit of deeds, the shares could not, in this case, be the subject of an equitable mortgage. But, in the first place, let me observe, that if these shares are to be taken as real property, no notice to the Company was requisite of the transfer of them, the title to them having vested by the written agreement, on the deposit of the certificates. And with respect to the application of *Ex parte Pollard* to the present case, it may be further observed, that *there* the whole interest in the land was attempted to be transferred; but here nothing was transferred, except certain documents, entitling the holder of them to a share in the profits of a mining speculation, which was the subject of trade. The German law, then, as to the transfer of real property, is in this case of no effect; for I look on these certificates as merely pieces of negotiable paper, that may be made available to the holder in the English share market. The petitioner is entitled to the order she asks, and the assignees ought to be restrained from proceeding at law for the recovery of the shares.

Sir JOHN CROSS.—I wish it to be understood, that the Court finds, as a question of fact, that the bankrupt, at the time of his bankruptcy, was not the reputed owner of these shares, and that the same were not then in his order and disposition.

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With respect to the case of *Ex parte Pollard*, I had the misfortune to differ from the rest of the Court in that case. It seemed to me, that where all the parties were within the jurisdiction of this Court, an equitable mortgage might be enforced of land in Scotland, as well as one of land in England.

ORDERED as prayed, and that the assignees should be restrained from all proceedings at law.

Ex parte GEORGE HITCHCOCK and FREDERICK ROGERS.

—In the matter of WILLIAM WORTH and HENRY WORTH.

Westminster,  
Jan. 15, 1839.

THIS was a petition to prove a debt against the joint estate, under the following circumstances:—

In the year 1837, the bankrupt, *William Worth*, who then carried on business as a linen draper on his separate account, at Totness, in Devonshire, was indebted to the petitioners in the sum of 810*l.* 6*s.* 10*d.*, for goods sold to him by the petitioners; to secure which he, on the 1st September 1837, gave them four bills of ex-

A. being indebted to C. on three bills of exchange, B. guarantees the payment of them, and afterwards A. and B. enter into partnership. When the first bill falls due, A. and B. remit to C. a portion of the amount, and solicit his indulgence for the

remainder; and on a subsequent occasion, when another bill fell due, A. and B. wrote again to C. for indulgence, saying, that they were arranging means to pay in full all liabilities resting on the business, and C. as well as others. C. returned no answer to these letters, but forbore to take hostile proceedings either against A., or B., who afterwards became bankrupt. Held, that in the absence of all direct evidence of the assent of C., the separate debt was not converted into a joint debt, and could not be proved by C. against the joint estate.

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change, drawn by himself upon one *Reeby*, one for 246*l.* 15*s.* 10*d.*, payable three months after date; another for 250*l.* 16*s.* 8*d.*, payable eight months after date; another for 254*l.* 17*s.* 6*d.*, payable twelve months after date; and another bill for 57*l.* 16*s.* 10*d.*, drawn by the petitioners, and accepted by himself, payable six months after date. At this time the other bankrupt, *Henry Worth*, carried on business on his separate account, at Kingsbridge, in Devonshire. The bill for 246*l.* 15*s.* 10*d.* fell due on the 4th January 1838, previous to which the petitioners received the following letter from *William Worth's* solicitor:—

“Gentlemen,

“Totness, 1st January 1838.

“ I regret to inform you, that it will not be in Mr. *William Worth's* power to meet his acceptance to you for 246*l.* 15*s.*, falling due on the 4th inst. The facts are, that an arrangement has been made for his brother *Henry* to join him as a partner in the concern here; and several persons have been in treaty with the brother for the purchase of his stock at Kingsbridge, the proceeds of which, it was intended, should have been applied in discharge of Mr. *William Worth's* acceptances, now falling due. Mr. *Henry Worth* has not yet succeeded in effecting a sale; and I am now instructed to solicit a renewal, upon Mr. *Henry Worth's* acceptance at three months, by which time it is hoped that the Kingsbridge concern will be converted into cash. Soliciting your reply, I am yours, &c.

“ *C. Micklemore.*”

The petitioners alleged, that upon the faith of the statement in the above letter, they consented to the renewal of the bill; but that, as a collateral security for the

same, in case the intended partnership did not take effect, they required a written guarantee from *Henry Worth*, not only to pay the renewed bill, but the other bills which were not then due. These terms being agreed to, the bill was renewed, at three months date from the 1st January 1838, for the sum of 250*l.* 0*s.* 7*d.*, which included interest and expenses; and *Henry Worth* gave the petitioners the following guarantee:—

“ Gentlemen,

“ In consideration of your renewing a bill drawn by *William Worth* on *James Reeby*, for 246*l.* 15*s.* 10*d.*, now dishonoured, I hereby agree to guarantee the due payment of the following bills : viz. *William Worth* on *James Reeby*, 250*l.* 16*s.* 8*d.*, due the 4th May; *William Worth* on *James Reeby*, 254*l.* 17*s.* 6*d.*, due the 4th September; and the amount of the above when redrawn, with interest, by Mr. *William Worth* on Mr. *James Reeby*, at three months, from the 1st January 1838, viz. 250*l.* 0*s.* 7*d.* I am, &c.

“ *Henry Worth.*”

On the 25th February 1838, *Henry Worth* entered into partnership with *William Worth*; upon which all the stock of *Henry Worth*, at Kingsbridge, or the proceeds, formed part of the partnership stock; and it was understood, as the petitioners alleged, that all the separate debts and liabilities should be transferred to, and paid out of, the partnership funds.

On the 4th April 1838, the bill for 250*l.* 0*s.* 7*d.* became due, and was dishonoured; when the attorney for the petitioners applied to *William Worth* for the payment of it, threatening to arrest him, if the amount was not remitted by return of post; and made also

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similar applications to *Henry Worth* and *James Reeby*. On the 5th April, *William* and *Henry Worth* remitted the petitioners 200*l.*, and requested they would take a renewed bill, accepted by them, for the remaining 50*l.*; which the petitioners positively refused.

On the 7th April 1838, the two bankrupts, in their partnership firm, wrote to the petitioners, entreating a little indulgence as to the payment of the 50*l.*, in which letter was contained the following expressions, " You have no cause to be apprehensive respecting your debt, for you will be honestly paid every penny of it. *We* can only state, that we will promise the desired sum within six days from this, and you shall not be disappointed in its receipt."

The petitioners alleged, that on the faith of this promise, they consented to give the bankrupts time for the payment of the 50*l.* until the 16th April; on which day the bankrupts remitted a draft for 30*l.*; but the remainder due on the bill was never afterwards paid.

On the 4th May 1838, the bill for 250*l.* 16*s.* 8*d.* became due, and was dishonoured; when the bankrupt, *William Worth*, wrote to the petitioners, soliciting a few days indulgence, saying, "*We* are now arranging means to pay in full all liabilities resting on the business, and you, as well as others, will be in receipt of what is due to you, without delay." On the 12th of May the two bankrupts wrote to the petitioners, informing them, that in order to pay off all debts due from their trade, they had determined to dispose of the business, and inquiring whether they knew of any one who was disposed to take it. The petitioners alleged, that in the full belief that the balance of their debt had been adopted as a debt of the partnership of *William* and *Henry Worth*, and that



the same would be paid out of their partnership funds, the petitioners forbore to take legal proceedings against them.

On the 6th June 1838, a fiat issued against *William* and *Henry Worth*, when there was due to the petitioners a balance of 50*l.* 5*s.* 1*d.*, in respect of their original debt. The petitioners applied to prove for this sum against the joint estate; but the Commissioners rejected the proof, on the ground that the goods forming the debt were sold by the petitioners to the bankrupt, *William Worth*, when he was a separate trader; that the above correspondence between the parties did not raise a joint liability; and that there was no adoption of the debt by the firm.

In answer to the allegations of the petition, the bankrupt, *Henry Worth*, deposed, that there was no agreement or understanding between him and *William Worth*, on the formation of the partnership between them, or at any time since, that their separate debts and liabilities should be transferred to and paid out of the partnership funds; that during the whole continuance of the partnership, the other bankrupt, *William Worth*, always carried on the correspondence of the partnership, the deponent, *Henry Worth*, never at any time interfering therein; and that all the letters set forth in the petition, which purport to have been written by the partnership firm, were not written or sent with the privity or knowledge of the deponent. *William Worth* also swore, that no part of the debt was adopted by the partnership.

*Mr. Swanston*, and *Mr. Keene*, in support of the petition. At the time of the commencement of the partnership between the two bankrupts, on the 25th Fe-

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bruary 1838, a separate liability for the debt existed from each partner; and from that period they contracted a joint liability, as is evident from the correspondence that passed between them and the petitioners, as to the non-payment of the different bills of exchange, and the indulgence they solicited of the petitioners; and more particularly, from the letters of the 5th and 7th of April, in which the bankrupts requested the forbearance of the petitioners, as to the payment of the balance on the first bill that became due. In the letter of the 5th April, signed in the name of the partnership firm, the bankrupts remitted 200*l.* on account of this bill, and inclosed a renewed bill in their joint names for the balance, which was returned; and when 30*l.* was afterwards remitted by them on account of the balance, it was by a draft in their joint names, on the London and Westminster Bank. From the last letter, too, of the 12th May, when the bankrupts informed the petitioners, that in order to discharge all their pecuniary engagements, they had determined to dispose of their business, the petitioners had reason to conclude that the two bankrupts considered themselves jointly liable for the debt; and, on this ground, forbore to press for payment of it.

Mr. *Anderdon*, and Mr. *Bacon*, *contra*, were stopped by the Court.

Sir JOHN CROSS.—The debt was in this case originally a separate debt contracted by *William Worth*, which was afterwards guaranteed by *Henry Worth*. The petitioners contend, that, on the formation of the partnership, it was turned into a joint debt. But, for this purpose, there must be the consent of the three parties.

Now, I have not discovered any consent expressed on the part of the petitioners, that the debt should be converted into a joint debt, except such consent is to be implied from their not answering the letter of the bankrupts, applying for indulgence. The question is, whether, before the bankruptcy, the petitioners agreed to turn it into a joint debt; or whether this was not an after-thought, when they found that a proof against the joint estate would be more advantageous. In the long correspondence that took place between the parties, I can find no distinct proposal from the bankrupts, that the debt should be considered a joint debt; and, certainly, not the slightest evidence of assent on the part of the petitioners, that it should be so considered. Indeed, it would never have been their interest to do so, until after the bankruptcy. As there was, therefore, no mutual contract in this instance between the debtor and creditor, as to any alteration of the former's liability, I think the Commissioners were right, in rejecting the proof against the joint estate.

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Sir GEORGE ROSE concurred.

Petition dismissed, with costs (a).

(a) See *Ex parte Whitmore*, ante, 365.

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Jan. 18, 1839.

In the matter of JOHN WOOD.

Where a creditor, two days after the time had expired for opening a country fiat, struck another docket, but, it appearing afterwards that the fiat had been opened on the twenty-eighth day, the office declined to issue a fiat on this docket, and the creditor afterwards applied to the Court; his application was dismissed, and would have been dismissed with costs, if he had had notice of the previous adjudication when he struck the docket.

It is not because the name of a creditor is inserted as one of the trustees in a trust deed, that the firm (of which he is a partner) cannot sue out a fiat as petitioning creditors, if the deed was not executed by himself, nor any member of the firm.

**THIS** was a case of competition between two solicitors for the fiat. A fiat had been issued on the petition of Messrs. *Frereson & Co.*, directed to Commissioners at Manchester, the twenty-eight days for proceeding on which expired on the 11th January. On that day the usual inquiries were made at the Bankrupt Office, by the solicitor of another creditor; and, no advertisement of the adjudication having appeared in the Gazette, the solicitor struck a docket on the 12th January, and applied on the 14th January for a fiat; which was refused at the office, the adjudication having taken place at Manchester on the 10th January.

Mr. *Swanston* now applied for an order, that a fiat might issue on the second docket, as the twenty-eight days had expired when that docket was struck, and no notice had then been received by the office of the previous adjudication on the 10th January. A doubt also arose, whether the existence of a deed of assignment of the bankrupt's property, under which one of the firm of *Frereson & Co.* had been appointed a trustee, did not incapacitate them from suing out a fiat as petitioning creditors; and also whether the state of accounts between the parties left a clear balance of 100*l.* due by the alleged bankrupt.

Mr. *Bacon*, *contrà*, was content to rest the matter upon the question of *bona fides*. Mr. *Frereson* was nominated a trustee under the assignment; but this was unknown by his attorney, who had been instructed to

sue out a fiat, and the deed in question was never executed by the petitioning creditors. The attorney for the party applying for the second fiat was the only person, who could prove the deed of assignment and the act of bankruptcy; and he was absent from Manchester on the day appointed for the adjudication. On a subsequent occasion, he offered to work the fiat jointly with the other solicitor; which not being acceded to, the subsequent proceedings took place.

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Mr. *Swanston* said, that his client had not had time to make an affidavit in answer to that statement.

Sir GEORGE ROSE.—The first fiat is valid. If the twenty-eighth day had elapsed, without its being opened, the applicant would have been entitled to a second fiat. If it had been opened, and the applicant did not know that fact, when he struck the second docket, he would be entitled to his costs. But if the charge made by the respondent is true, he must pay the costs,—not for any illegal act, but for want of good faith. As that allegation, however, is disputed, if the matter is now suffered to drop, there will be no order as to costs; but if the case stands over, to answer the charge, it must be at the hazard of costs, if the respondent's assertion is not disproved.

Mr. *Swanston*, upon this intimation, withdrew his application for time to answer the affidavits.

The ORDER was, therefore, that the motion should be refused, and the costs of the respondent come out of the estate.

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*Westminster,*  
Jan. 19, 1839.

Practice of the  
Court, as to di-  
recting a *vivâ*  
*voce* examina-  
tion.

Ex parte TATE.—In the matter of ODLIN.

MR. G. L. RUSSELL applied for an order for a *vivâ voce* examination, on the hearing of this petition.

Sir JOHN CROSS, after conferring with Sir GEORGE ROSE, said, that the usual course was to hear the petition, and then; if the Court found there was any matter of fact, respecting which the parties were at issue, the Court would in that case direct a *vivâ voce* examination; but not otherwise.

Ex parte JAMES LISTER, and WILLIAM ASHLEY.—In the matter of JAMES HADDON, JAMES CLARK, and JOHN PORTER.

*Westminster,*  
Jan. 22, 1839.

Special order made for incorporating the proceedings under two previous separate fiats, with those under a subsequent joint fiat, where assignees had been chosen, and a dividend declared, under the separate fiats.

THIS was the petition of assignees under a joint fiat, praying, that two separate fiats might be either annulled, or impounded, in favour of the subsequent joint fiat.

One of the partners resided at *Maranham*, another at *Para*, and the third at *Liverpool*; but all the property was situate at Brazil. The first fiat issued in 1837, and the second on the arrival of one of the other partners from Brazil; and, on the return of the third partner to this country, the petitioners issued a joint fiat against the three partners. It appeared, that the estate had been partially administered under the separate fiats, under which a dividend had been already declared.

Mr. Temple, and Mr. Koe, in support of the petition,

said, that there were no separate estates, or separate debts owing by either of the partners, against whom the separate fiats had issued.

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Mr. *Swanston*, and Mr. *Sharpe*, *contrà*. The question is, how the property can be most advantageously administered. There are proceedings now pending under the separate fiats, for a recovery of a portion of the property, which will be interrupted, if the Court grant the prayer of this petition. It would be unreasonable to annul these separate fiats, after a dividend has been declared under them; and there is no reason why either of them should be impounded. [Sir *John Cross*. Those who represent the three partners would be better able to proceed abroad for the recovery of the joint property, than the distinct representatives of each partner.] The law of Brazil does not present any difficulty in the realization of the property, under the separate fiats. One of these petitioners has proved his debt under the separate fiats.

The COURT ordered the proceedings under the separate fiats to be incorporated with those under the joint fiat, and that further proceedings under the separate fiats should be stayed, but without prejudice to a pending petition; that the Commissioners under the joint fiat should be at liberty to review the choice of assignees, and, if requisite, to proceed to a new choice; and that the costs of all parties should be paid out of the estate.

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*Serjeant's Inn  
Hall,*

March 23, 1839.

There being reason to apprehend that a bankrupt, after the adjudication, was about to abscond to America, the Commissioners issued a summons against him, and on that summons, without any warrant, the messenger arrested him, and brought him before the Commissioners, when they proceeded to examine him, and put to him this question:—

"You having five months ago taken away 1500*l.*, and now accounting only for 600*l.* of it, what account do you now give of the rest?" to which the bankrupt having answered, "I can give no account;" the Commissioners committed him for answering unsatisfactorily. The Court, on the petition of the bankrupt, (*dubitante* Sir G. Rose,) ordered the Commissioners forthwith to discharge the bankrupt from custody. See note, *post*.

Ex parte FREDERICK JAMES.—In the matter of  
FREDERICK JAMES.

THE bankrupt had been committed by the Commissioners for not answering to their satisfaction; he petitioned to be discharged. He had been a grocer at Bideford; he had quitted home on the 26th of February; a fiat issued, and he was found bankrupt on the 4th of March. There being reason to apprehend that he would not voluntarily surrender, and that he was about to abscond to America, the Commissioners issued a summons; and upon that summons, without any warrant, the messenger actually arrested him on the 9th March, and, having him so in custody, took him before the Commissioners on the 11th; they proceeded to examine him, and in such examination put to him the following question, to which he refused to give any other than the following answer:—

Q.—"You having five months ago taken away fifteen hundred pounds, and now accounting only for six hundred of it, what account do you now give of the rest?"

A.—"I can give no account."

Upon that answer, as unsatisfactory to them, the Commissioners committed him to the gaol of Exeter.

Mr. *Bethell*, in support of the petition, relied on the illegality of the arrest by the messenger, and said, that when the bankrupt was examined before the Commissioners, he was deprived of all access to his books and papers. He therefore pressed for the immediate discharge of the bankrupt.



Mr. *Swanston*, for the petitioning creditor, took a preliminary objection to the application; on the ground that it ought not to be by *petition*, but by *habeas corpus*.

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Mr. *Bethell* said, it was a case in which the Court was bound to interfere, it having power to order the Commissioners to assent to the bankrupt's discharge.

Sir GEORGE ROSE expressed his wish to entertain the petition, as far as the jurisdiction of the Court would permit; and therefore requested to know, whether an intimation of the opinion of the Judges, or a recommendation, would be sufficient; or whether it was intended to press the matter, as upon an absolute right to ask for a discharge by an order upon petition in the bankruptcy; for if so, it must be considered, first, how that could be done, without a return of the warrant upon *habeas corpus*; and next, whether the Court of Review could issue that writ;—an inability the less to be regretted, as Mr. Justice *Coltman*, the Judge in town during the vacation, was then at chambers, within whose province it unquestionably was.

Mr. *Bethell*. In proceedings in bankruptcy it is requisite that collateral circumstances should be taken into consideration, and an application to another Judge by *habeas corpus* will not bring the whole matter in view, as to the sufficiency of the grounds for commitment. An affidavit on the other side has been filed by the petitioning creditor, alleging that the bankrupt had left Bideford with a large quantity of goods in a van, for the purpose of converting the same into cash, and absconding to America; that the

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shop had been stripped of goods, for which false packages had been substituted; that the bankrupt was on his way to Bristol for the purpose of quitting the country; that the messenger found him on Salisbury Plain, where he seized the goods and took the bankrupt into custody; that he escaped, but was subsequently retaken, having been found concealed in a plantation; and that he was then taken to Exeter, and appeared on the day named in the summons, when he was examined by the Commissioners. The bankrupt has had no opportunity of answering these allegations; for not even his solicitor has been allowed access to him.

Sir JOHN CROSS.—Does he deny the imputed intention of going to America?

Mr. Bethell. It is impossible. There being no means of access to him, he has made no affidavit. His brother's affidavit is the only one procured. The bankrupt has been illegally taken by the messenger; and, while illegally in the custody of the messenger, has been examined and committed by the Commissioners. The commitment, therefore, in that view of it, cannot stand. Besides which, I contend that the answer of the bankrupt was satisfactory. As to the point of jurisdiction, to proceed by petition, I rely on *Crowley's* case (a), and *Ex parte Jones* (b).

Mr. Swanston, *contrà*. There is no case, where the Lord Chancellor has ever discharged a bankrupt from custody, in which the warrant has not been produced. No order can be made on this petition. The peti-

(a) 2 Swanst. 1.

(b) 4 Deac. &amp; C. 536.

tioning creditor was no party to the proceedings of the messenger. It is no matter how the bankrupt came before the Commissioners; when there, he did not answer satisfactorily. The refusal of access was undoubtedly improper, and ought to be remedied by application to the proper authority; but to that the petitioning creditor was no party. With respect to the complaint of the bankrupt having no access to his books and accounts, the answer is, that he has no books of account, and all his invoices have been destroyed.

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Sir GEORGE ROSE.—I have no disposition to recede from the opinion, which I am reported to have expressed in *Ex parte Jones*. A person in custody under commitment by Commissioners, for not answering to their satisfaction, is certainly not precluded from coming to this Court, upon a petition praying for his discharge; neither is it a preliminary nor conclusive objection to such an application, that his remedy is by *habeas corpus*. The Court, in due respect to the liberty of the subject, will go as far as it can; and by suggestion to the assignees, nay, by order upon assignees as to calling meetings and providing for the costs of such meetings—by intimation and recommendation to the Commissioners always respectfully attended to, will do as much in many cases, and at considerable less expense than probably would have been accomplished by the actual return of the warrant. In this case, if it had been that the bankrupt was now in the illegal custody of the messenger, and it was sought to discharge him from that, the Court could have interposed upon its own controlling authority; but as it stands, the illegal act of the messenger has nothing to do with it. The bankrupt being before the Commissioners, no matter how,—except as a circumstance enti-

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ting him to indulgence, as explaining his confusion, or as giving him a claim to further time, and inducing the Commissioners not to be dissatisfied with an answer, which, if given under other circumstances, they would have no reason not to deem unsatisfactory,—is clearly amenable to their right of examining him, and to the consequences of not answering to “*their satisfaction*,” and *that*, upon a petition here, as distinguished from a return upon a *habeas corpus*, is the only question,—has he answered to *their* satisfaction? The order asked is either an order for his discharge from the custody of the gaoler—what authority have we over the gaoler?—or it is an order, that the Commissioners do discharge him; but where is there given to us jurisdiction over the Commissioners, who, under the sanction of their oath, as fully in this case, as in that of the certificate, are of absolute and equal jurisdiction; nay, can the Commissioners themselves legally or regularly discharge, without further examination? Lord *Eldon* (a) had long settled, that he could not interfere otherwise than upon *habeas corpus*; and the order always was drawn by the officer of the Court of Chancery, not by the Secretary of Bankrupts. I am willing, however, to go as far as I can, and I have no hesitation in expressing my opinion, that the examination has not gone far enough; that the bankrupt ought to have the means of further explanation; and that the assignees should give him an early opportunity for that purpose. I can go further, at least as far as my opinion may have any influence on the bank-

(a) In the course of the argument, Sir *George Rose* asked Mr. *Montagu*, as *amicus Curie*, whether the practice had not been so settled; and whether any person would have thought of applying for a discharge, otherwise, than by *habeas corpus*. Mr. *Montagu* said, certainly not, it must always have been by *habeas corpus*. Sometimes there might be a petition brought on with it, but there must always have been the return.

rupt, and prevent his incurring the expense of a writ of *habeas corpus*:—I will add, that if the question had been before me upon a return to a *habeas corpus*, and with jurisdiction so to deal with it, I could do nothing more; for as I think the answer is not satisfactory, I could not discharge. What I now propose should be done is, let the bankrupt be forthwith brought up before the Commissioners for further examination; let the assignees, should there be no immediate meeting, procure a meeting for that purpose, at the costs of the estate.

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Sir JOHN CROSS.—The petition prays an absolute discharge; and Mr. *Bethell* says, he cannot, on behalf of his client, accept of any order but that. I came to this case, without any doubt as to the jurisdiction; but, having heard the opinion of my learned colleague, I feel it due to take time for consideration. The petition prays for an absolute discharge from the custody of the gaoler; but I think the Court cannot go to that extent, without having the gaoler before it. But what is there to preclude the Court from making an order on the Commissioners, that they direct the discharge of the bankrupt? That certainly would be the most convenient course, and is, as it appears to me, within the second section of the act, which gives the Court “superintendence and control” in all matters in bankruptcy. I have looked into the question and examined *Jones’s* case, as to hearing on petition; in that case, the Court agreed that the party was not entitled to relief on the merits. It is said, that a commitment, like a certificate, is purely within the discretion of the Commissioners; but, I think, there is a difference; the Court, on a certificate, cannot order the Commissioners to be satisfied,

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if they are not; but an order for discharge from their commitment does not involve that contradiction. I shall defer giving my final opinion at present; but there shall be no delay.

Sir GEORGE ROSE.—We cannot discharge, upon this petition. The order which I have suggested will, I think, be going as far as we can go. If, however, my learned colleague thinks *he* can order the discharge, and that it may be done, I shall not neutralize to the petitioner the benefit of that opinion,—and the rather so, as it will practically leave the matter as it finds it; since, *eo instanti* with the discharge, he may be had before the Commissioners for further examination.

The ORDER, which in the course of the day was sent to the Registrar, was, that the Commissioners acting in the execution of the fiat do forthwith discharge the petitioner out of the custody, in which he was detained under the warrant of the Commissioners, bearing date the 11th March, 1839; and that the costs of the petitioner and the respondent should be paid out of the estate (a).

(a) The author, not having been present when this case was decided, is indebted for the above report of it chiefly to the kindness of a distinguished member of the Court; who, unlike many other distinguished persons in times past and present, has too much good sense and good nature to view with scorn the “art that taught himself to rise.” Through the same kind medium,

the author's attention has been directed to the case of *Ex parte Tomkinson*, 10 Ves. 106, which does not appear to have been noticed on the hearing of the case above reported. In *Ex parte Tomkinson*, a petition was presented to the Lord Chancellor by a bankrupt, praying that he might be discharged from commitment, for not giving satisfactory answers; and, notwithstanding

ing the assignees consented to his discharge, Lord *Eldon* refused to make any order, on the ground that the application should not have been made by *petition*, but by writ of *habeas corpus*. The counsel in support of the petition cited *Ex parte Lingood*, 1 Atk. 240, and said that the bankrupt appeared to have been delivered by the Commissioners to, and to remain in, the custody of the messenger. But Lord *Eldon* expressed a doubt, whether the order referred to in the case cited was an authority for proceeding by petition; observing also, that the warrant of the Commissioners was for commitment to the county gaol, under the 5 *Geo.* 2. c. 30; and if he was not committed, his lordship said he had nothing to do with it. This decision of Lord *Eldon* is certainly very strong against the proceeding by *petition*. But, though his lordship doubts whether the order made in *Ex parte Lingood* was an authority for that form of proceeding, what was said by Lord *Hardwicke* in that case seems to be in favour of it. "At the first I had great doubt," says Lord *Hardwicke*, "whether I could properly determine the legality of the commitment; as a *habeas corpus* might have been sued out, and have been decided by the Judges of the Common Law; which is the ready way. But I do remember a case of *John Ward*, before Lord Chancellor *King*, not unlike the present, where he determined a commitment by Commissioners of Bankrupt to be justifiable, after he had taken some time to consider of it." Lord *Hardwicke*, therefore, entertained

the *petition* in that case; and ordered that so much of it, as prayed that the bankrupt might be discharged from his commitment, should be dismissed; leaving him, however, at full liberty to bring a *habeas corpus*, if he thought proper.

In the case of *Ex parte Hiams*, 18 Ves. 237, which occurred sixteen years after *Ex parte Tomkinson*, Lord *Eldon* seems to have retained the opinion he had before expressed, as to the proper proceeding being by *habeas corpus*, though not in so strong a degree; for he did not refuse, as in *Ex parte Tomkinson*, to deal in any way with the petition; but, after hearing the whole case, said he would intimate to the Commissioners,—which would be sufficient without an order,—that they should review the case, and re-examine the bankrupt forthwith: adding, "if pressed to discharge him, doubting, whether I can upon *petition*, I will have that ascertained; and if the writ of *habeas corpus* should be necessary, I will issue it immediately." In the former part of his judgment, his lordship says, "a doubt has been handed down by tradition, whether the Lord Chancellor, by that authority which he has in bankruptcy, can deal with the commitment, as he as Lord Chancellor, and the Judges, can, upon the return to a *habeas corpus*; and I find, upon inquiry at the office, that for the last twenty-seven years, this sort of interference has been uniformly refused. The difficulty, when started, has been avoided by taking the other course not open to objection; and in some instances it has been found salu-

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tary to send it again to the Commissioners to be reviewed; the Lord Chancellor not dealing directly with the commitment, but, by his advice and order, impressing upon the Commissioners the expediency of reconsidering, whether they were perfectly right in the exercise of their authority." This reasoning agrees very much with that of Sir *George Rose*, in his able judgment in the case above reported. It is very remarkable, however, that throughout the whole discussion in *Ex parte Hiams*, the positive decision of Lord *Eldon*, in *Ex parte Tomkinson*, was never once alluded to; neither has the reporter noticed it among the other cases referred to by him in a note. If, indeed, Lord *Eldon's* former decision on the subject did then by any chance come across the mind of that illustrious Judge,—who certainly was not, in general, too positive or arbitrary in his judicial conduct,—he might probably have thought, that he disposed of the case of *Ex parte Tomkinson* in somewhat too arbitrary a manner; for it does seem not very consistent with sound reason, or principles of equity,—when a wretched bankrupt, deprived of his property and his liberty, appeals for redress to that tribunal, which exercises absolute dominion over both his person and his property, and prefers his complaint in the ordinary form of proceeding, by which all matters relating to bankrupts and their effects are brought before it for decision,—that he should be told his complaint cannot be heard, because he has a remedy by another form of process before other tribunals, which every subject in the realm possesses, and

which of course he himself would have, although the law of bankruptcy had never existed.

With respect to the case above reported, the learned Judges having expressed somewhat different opinions as to the proper method of disposing of it, it may, perhaps, be not thought too presumptuous, if the author ventures to submit a few remarks on the important question there brought before their notice; and which may be thus considered: 1st. Was the proper remedy by petition, or *habeas corpus*? 2. If by *habeas corpus*, has the Court of Review power to issue that writ? 3. The expediency of the order that was finally made, directing the Commissioners unconditionally to discharge the bankrupt.

1st. As to the remedy by petition, or *habeas corpus*. It seems clear, from what Lord *Eldon* says in *Crawley's case*, 2 Swanst. 30, *et seq.*, that, notwithstanding his former positive rejection of the application by petition in *Ex parte Tomkinson*, and his more qualified opinion against that form of proceeding in *Ex parte Hiams*, his lordship on maturer reflection thought the application might be made by petition, as well as by *habeas corpus*. Lord *Eldon* there says, controverting an opinion expressed by Lord *Loughborough* in *Nowlan's case*, (see 6 T. R. 118; 2 Rose, 401,) "I find that it was the practice, before the stat. 5 Geo. 2. c. 30., for the Lord Chancellor to discharge prisoners under commitment from Commissioners of Bankrupt, by order; and it seems clear, that that act has not deprived this Court of the authority, which it then pos-



sessed. This Court has in several instances, *on petition*, ordered the discharge of persons committed by the Commissioners; sometimes ordering the Commissioners to discharge him, sometimes the *gaoler*, passing over the Commissioners." He then specifies several instances, namely, *Ex parte James*, 1 P. W. 610; *Ex parte Lingood*, 1 Atk. 240, already mentioned; *Ex parte Brailsford*, in 1725; and *Ex parte Mace*, in 1728. It seems, therefore, not an unreasonable inference, that Lord *Eldon*, after long experience with the subject, altered the opinions he had expressed in *Ex parte Tomkinson* and *Ex parte Hiams*; for, though the chief point in the case of *Ex parte Crawley* was, whether the Lord Chancellor could issue the writ of *habeas corpus* at common law in the vacation, yet that case was discussed before him, and spoken to by him, on no less than *nine* different occasions, and he appears to have canvassed every point in it with the most painful and laborious attention. For the able report of this case,—which, in a more striking degree than any other report in the books, portrays from day to day the successive workings of Lord *Eldon's* mind, and his great anxiety to arrive at a right conclusion,—and for the learned notes appended to it, the profession is indebted to the talents and research of a gentleman, which shed a lustre on the dull employment of reporting, and which are now deservedly appreciated in every branch of the profession. In *Ex parte Jones*, 4 Deac. & C. 536, which was cited by the counsel in

support of the petition in the case above reported, Sir *George Rose* says, "I think it must be ceded; that we have a general jurisdiction, *upon petition*, touching the discharge of bankrupts who have been committed;" and Mr. Justice *Erskine*, then the Chief Judge of this Court, had no doubt that the proceeding by *petition* was the proper course to pursue in that case; assigning, in the course of his judgment, these forcible reasons for his opinion, namely, that in the proceeding by *habeas corpus*, the Court cannot travel out of the warrant of commitment, but, on *petition*, the Court can deal with other objections to the commitment than such as arise on the face of the warrant itself; moreover, if the question be, upon the sufficiency of the bankrupt's answers, or the course the Commissioners took in the mode of his examination, the Court, having the examination on the proceedings before it, can, from them, determine such a question, without the warrant; the proceedings being, in fact, the original from which the warrant itself is made out; besides which, he added, a petition is, by far, the less expensive mode of proceeding. The proceeding by *petition* is, indeed, the only course, by which the bankrupt's answers, as stated in the warrant, can be compared with the examination upon the proceedings: and if the complaint of the bankrupt be, as it was in the cases of *Ex parte Hiams*, and *Ex parte Jones*, that the Commissioners refused to examine other witnesses, whose evidence would have afforded a satisfactory explanation of the

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bankrupt's answers, this objection could not have been dealt with by the Court, on a return to a *habeas corpus*. For all these reasons, it is submitted, that the proceeding by *petition* is the proper and better course for the bankrupt to adopt, when he seeks to be relieved from what he alleges to be a wrongful imprisonment by the Commissioners.

2ndly. Has the Court of Review power to issue the writ of *habeas corpus*, either under the statute, or at common law? The statute of 30 Car. 2. c. 2. certainly seems, in every section, to point to the Courts at Westminster, then in existence, and not to include within its provisions any new Courts of Law or Equity, that might afterwards be established. The 3rd section, which enables a single judge to issue the writ in vacation time, says, that it shall be so issued, upon complaint "to the Lord Chancellor, or Lord Keeper, or any one of his Majesty's justices, *either of the one bench or of the other*, or the barons of the Exchequer of the degree of the coif." And the 56 Geo. 3. c. 100., which extends the remedy of *habeas corpus* to other commitments than those for criminal matters, in section 2, thus specifies the same high legal functionaries, with the omission of the Lord Chancellor,—"it shall be lawful for any one of the barons of the Exchequer of the degree of the coif, as well as for any one of the justices, of one bench, or the other;" and, in the 2d section, as if to shew what it meant by the justices of one bench or the other, it specifies, by name, "the Court of King's Bench, or the Court of Common Pleas." It is clear, therefore, that

the Court of Review cannot claim the power to issue the writ under the provisions of either of the *habeas corpus* acts.—Has it, then, the power given to it by the statute constituting it a Court, viz. 1 & 2 Will. 4. c. 56.? By sect. 1 of that statute, it is constituted "a Court of Law and Equity;" and, by the next section, its jurisdiction, whether of law or equity, is confined to "superintendence and control in all matters of bankruptcy;" and over "all matters in bankruptcy, as now usually are or lawfully may be brought, by petition, or otherwise, before the Lord Chancellor." Now, these words in the act cannot, of course, be construed to give any powers to the Court of Review which had been previously given by statute to the Courts of King's Bench, Common Pleas, and Exchequer, unless they related to matters in bankruptcy. But the writ of *habeas corpus* is not a matter in bankruptcy; so little so, that, on those occasions, when Lord Eldon issued the writ, preferring it to the proceeding by petition, he uniformly declared that he issued the writ under his authority of Lord Chancellor, at Common Law, and not by virtue of his jurisdiction in bankruptcy; and as Sir George Rose observed, in *Ex parte Jones*, 4 Deac. & C. 536, any order he made on the proceeding by *habeas corpus* was not drawn up by the officers in bankruptcy, but by one of the registrars in Chancery. If this opinion and practice of Lord Eldon be correct, that appears to dispose of the whole question now under consideration; for, if the Court of

Review can only claim such jurisdiction in bankruptcy, as was formerly exercised by the Lord Chancellor, then, according to Lord Eldon, the issuing of a writ of *habeas corpus* formed no part of the Lord Chancellor's jurisdiction in bankruptcy, but was confined to his jurisdiction in the Court of Chancery. The only doubt, that could possibly be suggested, would be from the enactment in the 1st section, wherein the Court of Bankruptcy is declared to be a *Court of Law*, as well as a Court of Equity. But for what purpose is it a Court of Law? Merely as auxiliary to its jurisdiction in bankruptcy. Thus, it has powers given to it, which the Lord Chancellor had not, namely, to try issues, to summon juries, and examine witnesses *viva voce*; therefore, any process, which is necessary for the execution of these powers, such as jury process, and *subpœna ad testificandum*, it has, of course, authority to issue; and if it had no power to bring an imprisoned bankrupt before it but by writ of *habeas corpus*, it would have, no doubt, jurisdiction to issue that writ. But, as it has clear authority to make an *Order* for this purpose, it does not want to call that writ in aid; and, for any other purpose unconnected with "matters of bankruptcy," it would have just as much right to issue a writ of *habeas corpus*, as a writ of *habere fucias possessionem* in an action of ejectment.

We now come to the *third* and last question above propounded, namely, as to the expediency of the order in the above case, directing the Commissioners to discharge the bank-

rupt; and this will, of course, depend upon the facts, as stated to the Court on affidavit. Now what are those facts? According to the statement of the petitioning creditor, deposed to upon oath, it appeared that the bankrupt had absconded from his home with a large quantity of goods, with which he was on his way to Bristol, for the purpose of going to America; that the shop had been stripped of goods, for which false packages had been substituted; that the messenger overtook the bankrupt with the goods on Salisbury Plain, where he seized the goods, and took the bankrupt into custody; from which custody the bankrupt escaped, but was subsequently retaken in a plantation; and that he was then taken by the messenger to Exeter gaol, and brought up in custody before the Commissioners, on the day mentioned in the summons. Now, if this statement of the petitioning creditor was true, the messenger was perfectly justified in apprehending the bankrupt,—not by virtue of the summons of the Commissioners, but (as he, or even any private person, could have done in this instance) on the ground that the bankrupt was in the actual commission of a felony; and the subsequent retaking him in the plantation was also equally justifiable, for it was on fresh pursuit, after an escape from a lawful arrest. The only particle of blame that attaches to the messenger was, in not taking the bankrupt before a magistrate, instead of taking him to prison; for, if he had been brought before a magistrate on a charge of felony, and committed for further examination, he might then have been

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lawfully brought before the Commissioners in the custody of the gaoler, and the messenger's conduct could not have been impeached. But when the bankrupt was actually brought before the Commissioners, however irregularly, on the very day, and for the very purpose, for which they had previously summoned him, and for which they could have compelled his attendance if he had disobeyed their summons,—were they bound to refrain from examining him, and set him at perfect liberty, with these heavy charges preferred against him, merely because the messenger had in one slight particular exceeded the extent of his authority? It is true, that the bankrupt's counsel said, on the hearing of the above petition, that the bankrupt had had no opportunity of answering these allegations, as all access to him had been denied to his solicitor. But could he not have answered such charges as these, without the aid of a solicitor, when he appeared before the Commissioners? The charges, it must be admitted, were serious enough to have induced the Court to call for an answer, before they disposed of this petition in his favour; and if the Court had made an order, that the bankrupt's solicitor should have proper access to him, to prepare an affidavit in answer to these allegations,—or that

the bankrupt should be brought up again before the Commissioners, and should have free access to his books and papers, as well as to his solicitor, for the purpose of answering any inquiries touching the disclosure and discovery of his estate and effects—probably such an order would have been quite sufficient to meet the justice of the case, instead of a peremptory order on the Commissioners for the absolute discharge of the bankrupt. In *Ex parte Lingood*, 1 Atk. 240, where the Commissioners had evidence of the bankrupt's intention to secrete his effects, and on his refusal to be examined when brought before them on their warrant, they re-committed him to Newgate, Lord Hardwicke said, that the Commissioners had “done *rightly, wisely, and discretely*,” and refused to discharge the bankrupt; permitting merely that the time for his last examination should be enlarged, to enable him to make a full and true disclosure and discovery of his estate and effects.

The author has to beg pardon of his readers for the length of this note; but he hopes, that the importance of the subject, and the doubts expressed on the bench, will plead his excuse for so long forgetting the character of reporter in that of commentator.

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Ex parte RICHARD GIBSON.

**THIS** was an application of a party against whom an affidavit had been filed, under the new act for the Abolition of Arrest on Mesne Process, 1 & 2 Vict. c. 110.; by the 8th section of which act it is declared, "that if any single creditor, or any two or more creditors, being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force concerning bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing, requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits, and notice, pay such debt or debts, or secure or compound for the same, to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties, as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be

*Westminster,*  
*Jan. 22, 1839.*  
An affidavit was filed against a trader, under the act for abolishing Arrest on Mesne Process, 1 & 2 Vict. c. 110. s. 8.; but, on account of some irregularity in the notice required by that Act, the notice was withdrawn by the creditor. The Court refused to take the affidavit off the file, on the application of the trader; as the creditor was entitled, if he chose, to give a fresh notice.

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brought, according to the practice of such Court, or within such time and in such manner as the said Court, or any Judge thereof, shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits, and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

Mr. *Gibson*, against whom an affidavit had been filed under the above act, was a farmer in Warwickshire, and was induced to become a shareholder in a Joint Stock Company, which certainly outshone all its competitors for the magnificence of its title, being designated "The Birmingham Patent Horse-shoe, and Iron Tip and Heel Company." Mr. *Gibson* having 180 shares in this tempting speculation, and not having paid up his calls, an attorney for the Company made an affidavit, pursuant to the terms of the act, alleging that Mr. *Gibson* was indebted to the Company in the sum of 180*l.*, being the amount due from him on a call of 1*l.* per share. The affidavit was filed in the Court of Bankruptcy on the 2d instant, the notice required by the act having been served on Mr. *Gibson* on the 31st December. On the 10th instant, however, another notice was served upon him, withdrawing the previous notice, and stating that there was no longer any intention of proceeding to enforce the call. When this second notice was served, Mr. *Gibson* was about to put in bail, according to the requisitions of the act; and he was now advised to apply to the Court for the removal of the affidavit from the file, lest any other creditor might attempt to avail himself of this sup-

posed act of bankruptcy, and thereby occasion him inconvenience and expense.

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Mr. *Swanston*, in support of the motion. When a foundation is laid by an affidavit and notice of a creditor, according to the directions of the act of parliament, and the requisitions of the statute are not complied with by the alleged debtor, it becomes competent to any other creditor to avail himself of the proceeding, as an act of bankruptcy. For, although the debtor is not called on to comply with any of the three things required by the act, after the creditor has thus abandoned his notice, yet after the 21 days expire, he is placed in this predicament, that any third person may set up his omission to do so, as an act of bankruptcy. It is true, that this Court might annul a fiat issued by such third person; but the application for this purpose would occasion much expense and inconvenience to Mr. *Gibson*. [Sir *George Rose*. I do not see, how the Order of the Court to take the affidavit off the file would prevent any default from operating as an act of bankruptcy.] The creditor says, "I hereby withdraw the notice filed on the 31st December last." [Sir *John Cross*. I conceive, there is not *prima facie* evidence of an act of bankruptcy, when the notice is withdrawn; for it would then be no notice. A stranger, who sued out a fiat under the 8th section of this act of parliament, must prove several things:—that an affidavit is filed—that the party has been served personally with a copy of it—and with a notice requiring payment of the debt; and no adjudication could take place, unless all these things were proved.] Although the Commissioners might not proceed to adjudicate, yet the party would be in peril. Now, if the affidavit is taken off the file, a

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creditor could give no proof of the affidavit before the Commissioners; for he could obtain no office copy of it, and the Commissioners would not receive secondary evidence of the affidavit. There can be no objection to this application being made by motion; for the established mode of proceeding to take papers off the file is, to make the application by motion. [Sir *John Cross*. Suppose a person had taken an office copy of the affidavit, *before* it was taken off the file.] The Commissioners ought not in that case to receive the office copy in evidence; for it would not be an office copy of an affidavit *then on the file*.

Mr. *J. Russell*, for the respondent. Under the provisions of the act of parliament, the notice given on the 31st December would have been wholly nugatory; inasmuch as the affidavit was not filed until the 2d January; and the act requires notice of an affidavit *already filed*, and not of an affidavit *to be filed*. This defect being discovered on the 11th instant, the notice was very properly withdrawn. He was then stopped by the Court.

Sir JOHN CROSS.—It is quite clear in this case, that the notice was irregular, having been given before the filing of the affidavit; and therefore it stands as if no notice was given. And there ends the whole question. But what is to prevent the creditor from now giving a regular notice? Has he not a right to keep his affidavit on the file, and to give the requisite notice, in order to avail himself of the remedies given him by the act? There is nothing in the act to prevent a renewed notice, allowing the debtor the 21 days after such fresh notice, to do what is required of him by the act. I will not say,



whether this Court would interfere for this purpose, under a different state of circumstances; it is sufficient, on the present occasion, to say, that the creditor has an interest in the affidavit, and has a right to give a new notice.

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Sir GEORGE ROSE.—The safest course for the applicant to have pursued would have been, to rely on the discretion of the Commissioner, or to have tendered a bond, according to the provisions of the act. But the applicant cannot say, that the party, who has made the affidavit, may not follow up that proceeding by a regular notice. The Court, therefore, cannot interpose its aid in his behalf. But no costs will be given, on refusing this application; as the difficulty originated in the mistake of the respondent, and that mistake, on discovery, has not been followed up by a regular notice.

Motion refused, without costs.

Ex parte GEORGE RAWLINSON.—In the matter of  
GEORGE JONES.

MR. DEACON moved in this case, on the part of the petitioning creditor, for an order that the fiat might be directed to a Commissioner of the Court of Bankruptcy in London, instead of to Commissioners in the country, on an affidavit which stated the following grounds:—that the bankrupt lived at Taunton, in Somersetshire; that the debts owing by him amounted to 2000*l.*, of which sum 1300*l.* was owing to creditors in London;

Westminster,  
Jan. 22, 1839.

The Court will not order the fiat to be directed to a London Commissioner, instead of country Commissioners, merely because a majority of the creditors reside in London.

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that the act of bankruptcy was the filing an affidavit in the Court of Bankruptcy, under the late act of 1 & 2 Vict. c. 110. s. 8., for abolishing Arrest on Mesne Process; and that deponent believed it would be less expensive and more advantageous to work the fiat in London, instead of at Taunton.

Sir JOHN CROSS.—I do not think there are sufficient grounds stated, for directing this fiat to a London Commissioner. It is most desirable in all cases, if possible, that the fiat should be worked at or near the place where the bankrupt lived and carried on his trade; as an inquiry into his affairs, and the collection and realization of his property, are attended with much greater facility on the spot, than where the fiat is worked at a distance. If the fiat was worked in London, the expenses of the bankrupt's journey to London, in order to be examined by the Commissioner, must be paid by the petitioning creditor, or the estate; and these might probably exceed the amount of the expense apprehended from a country fiat.

Sir *George Rose* had left the Court.

Motion refused (a).

(a) In the course of the day, Mr. *J. Russell* made the like motion in another case, on similar grounds, which was also refused. See *Re Gregg*, ante, 381.

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Ex parte JAMES RAY and others.—In the matter of  
MARY WOODLIFFE.

Westminster,  
Jan. 26, 1839.

**THIS** was the petition of the members and stewards for the time being of a friendly benefit society, called "The Liberal Society," established at Pontypool, in Monmouthshire; and it prayed an order on the assignees to pay over to the petitioners the sum of 153*l.* 4*s.* 10*d.*, under the circumstances stated in the petition, which were as follow :

On the appointment of the bankrupt as treasurer of a friendly society, it was agreed, that of the funds then in hand she was to pay interest for 120*l.*

—*Held*, that this was not to be considered as a loan to her ; but that it was in her hands and possession by virtue of her office of treasurer, within the meaning of the 4 & 5 *Will.* 4. c. 40. s. 12., and that the assignees were bound to pay over the amount to the society.

The society was established in the year 1792, and the rules of the society were afterwards duly inrolled, pursuant to the provisions of the 33 *Geo.* 3. c. 54. On the 3d September 1829, the bankrupt was appointed treasurer of the society, and had then in hand the sum of 149*l.* 8*s.* 9*d.*, and out at interest the sum of 50*l.* At the time of her appointment, the following resolution was entered into by the society: "that she the said *Mary Woodliffe* is to have the sum of 149*l.* 8*s.* 9*d.*, of which she is to pay interest for 120*l.*" On the 7th September 1829, the bankrupt, pursuant to the requisitions of 10 *Geo.* 4. c. 56., entered into a bond, with two sureties, to the clerk of the peace, in the sum of 300*l.*, for the just and faithful execution of the office of treasurer. The bankrupt continued to fill that office until her bankruptcy, which took place in November 1837, at which time she was in possession of 153*l.* 4*s.* 10*d.* belonging to the society, including the 50*l.* out at interest when she became treasurer.

By the last Friendly Society Act, 4 & 5 *Will.* 4. c. 40. s. 12., it is enacted, "that if any person appointed to any office in a society established under the statute of

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10 Geo. 4. c. 56., or that act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any monies or effects belonging to such society, shall die, or become bankrupt or insolvent, his heirs, executors, administrators, or assigns shall, within 40 days after demand in writing, by the order of any such society, or committee thereof, or the major part of them assembled at any meeting thereof, pay out of the estate, assets, or effects of such person, all sums of money remaining due, which such person received, by virtue of his said office or employment, before any other of his debts are paid or satisfied; and all such assets &c. shall be bound to the payment and discharge thereof accordingly."

On the 19th December 1837, the solicitors of the society made a formal demand in writing on the bankrupt's assignees to pay over the sum of 153*l.* 4*s.* 10*d.*, pursuant to the requisitions of the above statute. On the 6th August 1838, the petitioners, on behalf of the society, applied to prove the sum of 153*l.* 4*s.* 10*d.* under the fiat; but the Commissioners refused to receive the proof, because the society would not admit that the bankrupt had in her hands no more than 29*l.* of the money of the society as treasurer (which they offered should be paid in full), and that she held the remainder of the 153*l.* 4*s.* 10*d.* in her individual capacity, and in respect of which they were willing the society should take a dividend *pro rata* with the bankrupt's other creditors. The petition then alleged, that by the cash account of the society, it appeared that the balance in the hands of the bankrupt was constantly fluctuating, there being monthly receipts, and weekly disbursements to sick paupers. That the society never held any secu-

rity for any part of the money in the hands of the bankrupt, except the bond to the clerk of the peace; and that there never was any understanding or arrangement that the bankrupt was to be considered as liable for any specified or particular portion of the fund only, but for the whole, as the treasurer of the society. The petition further stated, that the members of the society were all poor labourers, most of them having large families, and had not the means of defraying the costs of any action against the sureties in the bond.

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Mr. *Swanston* appeared in support of the petition.

Mr. *J. Russell*, and Mr. *William Rose*, *contrà*. This petition is an appeal from the decision of the Commissioners, who thought that the petitioners must prove under the fiat for 120*l.*, and only be allowed to take the residue of the 153*l.* 4*s.* 10*d.* out of the bankrupt's effects. As the bankrupt was bound to pay interest for the sum of 120*l.* to the society, this plainly shows that she had the use of that sum as a loan from the society; for the treasurer of any company, or public body, has only the mere custody of the funds, and has no right to use the money intrusted to his care. The case of *Ex parte the Stamford Society* (a), is very like the present; and the Lord Chancellor there says, that the provisions in the Friendly Society Acts only apply to a case, where the money gets into the hands of a bankrupt in his character of treasurer, and not as a loan. So in *Ex parte the Amicable Society of Lancaster* (b), it was held, that those provisions did not extend to debts due from the officers of such societies, in their individual capacities, and not in their official characters.

(a) 15 Ves. 130.

(b) 6 Ves. 98.

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RAY  
and others.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—This seems to me a very clear case, and I think that the Commissioners have done wrong, in rejecting the claim of the petitioners. It is admitted, that the bankrupt held the office of treasurer of this society; but it is contended that she did not hold the 120*l.*, as treasurer. It becomes material, therefore, to see the terms, on which this money was intrusted to her custody. It appears, that on the appointment of the bankrupt to the office of treasurer, the funds of the society amounted to 149*l.* 8*s.* 9*d.*, of which sum it was agreed that she was to “pay interest for 120*l.*” Now, her appointment as treasurer, and her agreement to allow interest for this sum, were contemporaneous acts; and it cannot be said, that the 120*l.* did not come to her hands, *by virtue of her office or employment* as treasurer. But then it is contended, that the agreement to pay interest makes a difference in the case, and shows that this portion of the money intrusted to her was to be considered as a loan. It appears to me, however, that the legislature did not contemplate that the money in the hands of the treasurer was to be locked up in a chest, but that it should be deposited with the treasurer, in the same manner as with a banker. And I see nothing in the case which rebuts the presumption, that the whole of the money was in her hands and possession, by virtue of her office of treasurer.

Sir GEORGE ROSE concurred.

ORDERED as prayed, but without costs.

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**Ex parte LAW.**—In the matter of **JOHN HILTON BAYLEY**  
and **HUSSEY CHAPMAN.**

*Westminster,*  
*Jan. 29, 1839.*

**THIS** was a petition, that a proof, which had been made against the separate estate of *Bayley*, might be transferred to the joint estate, under the following circumstances.

The bankrupts carried on a partnership trade under their separate names, one residing at Manchester, and the other in London. At Manchester the partnership was carried on under the name of *J. H. Bayley*, and at London under the name of *H. Chapman*. The petition was presented on behalf of a Company called "The Imperial Bank of England," of which the petitioner was one of the public registered officers; and the debt arose on several bills of exchange indorsed to the Company, some drawn by *Bayley* upon *Chapman*, and others by *Chapman* upon *Bayley*. On the 28th May 1838 a separate fiat issued against *Bayley*, under which the petitioner, on the 10th June, proved for the sum of 745*l.*, being the amount of the several bills of exchange. On the 12th June a joint fiat issued against both the bankrupts, under which the petitioner, on the 14th July, also proved for the same amount against the joint estate. In November the petitioner received a dividend of 2*s.* 4*d.* in the pound on his proof against the separate estate; and on the 20th December the Commissioners expunged his proof against the joint estate, on the ground that he had made an election to prove against the separate estate. The petitioner, by his affidavit in support of the petition, stated, that at the time when he made each proof, he thought he might prove against both estates; that he

Where *A.* and *B.* carried on a partnership trade under their separate names, one residing at Manchester, and the other in London; it was held, that the holder of bills drawn by one partner upon the other must elect, whether he would prove against the joint or separate estates; and that he was not concluded by a proof already made, and the receipt of a dividend under the separate estate; but, on refunding the dividend, might retire his proof from the separate estate, and prove against the joint.

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did not intend to elect, and that he was not told on either of those occasions, that he was bound to make an election; and that before the proof against the joint estate was expunged by the Commissioners, the petitioner stated, that if he was bound to elect, he would elect to withdraw his proof against the separate estate, and prove against the joint estate. He now prayed, that on refunding the dividend which he had received on his proof against the separate estate, the proof might be transferred to the joint estate.

In answer to the statements in the petition, the solicitor to the assignees under the separate fiat deposed, that at a meeting of the creditors of the bankrupts on the 28th August, the petitioner was informed of the partnership between the two bankrupts, and was told he could not prove against both estates; and the solicitor referred him to some of the authorities on the subject; among others, to *Ex parte Moul* (a). It was sworn also by another witness, that at the meeting to declare a dividend of the separate estate of *Bayley*, the petitioner was told that he could not receive dividends under both estates; and that the Commissioners then said, that his proof must be struck off from one of the estates.

Mr. *Swanston*, and Mr. *Hardy*, in support of the petition. Although, after the decision in *Ex parte Moul*, the petitioner cannot contend for a right of double proof, yet he ought to be permitted to transfer the proof from the separate to the joint estate, on refunding the dividend received under the separate estate. The receipt of a dividend is not binding on the creditor, but is a mere circumstance capable of explanation, and does not prove

(a) 1 Deac. & C. 44; 1 Id. 419; Mont. & B. 28.



that he has made an election. This view of the case is supported by *Ex parte Bolton* (a), where a creditor, who had proved against the joint estate, and received a dividend, was held not concluded by that circumstance, but that, on refunding the dividend, with interest, he might prove as a separate creditor. And the same principle was acted upon in *Ex parte Husbands* (b).

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Ex parte  
Law.

Mr. Metcalf, for the assignees of the joint estate. The petitioner in this case had plenty of time to ascertain what were the assets of the different estates, before he received the dividend under the separate estate. The petitioner was told by the solicitor to the assignees, that he could not prove against both estates, and he was referred to the authorities under this head of the bankrupt law; he ought, therefore, to have ascertained what the law was on the subject, before he made his double proof against both estates. Before he received a dividend under the separate estate, he was fully aware of his rights, and was bound to elect; for the Commissioners, at the dividend meeting, informed him that his proof must be struck off one of the estates. The petitioner, therefore, could not plead ignorance of his rights, when he received the dividend; which distinguishes this case from those which have been cited. In *Ex parte Husbands* (c), which was first before the Vice-Chancellor, Sir J. Leach thought, that if the petitioner, after proving against one estate, waited for the dividend meeting, that was quite enough to conclude him, without the actual receipt of the dividend. In none of the cases cited does it appear, that the petitioner was cognizant of his rights.

(a) 2 Rose, 389; Buck, 7. (b) 2 G. & J. A. (c) 5 Mad. 419.

1839.

  
Ex parte  
Law.

Mr. *J. Russell* appeared for the assignees of the separate estate.

Mr. *Swanston*, in reply.

The COURT thought, that the first moment, when the petitioner was bound to make his election, was at the time the Commissioners expunged his proof against the joint estate; when he told the Commissioners, that if he was bound to elect, he wished to withdraw his proof against the separate estate, and prove against the joint estate. The petitioner was not precluded, therefore, by the previous receipt of a dividend under the separate estate; but the expenses of refunding the dividend, and the transfer of the proof, must of course fall upon the petitioner.

Sir GEORGE ROSE observed, that it would be requisite for the petitioner to take an inquiry, whether the signatures of the respective bankrupts, as drawer and acceptor of the bills in question, were intended to bind the firm, or merely each individual partner in his separate capacity; and that if the assignees declined to work the Order, or the Commissioners declared themselves satisfied, the petitioner might then elect against which estate he would go.

The ORDER was, that it should be referred to the Commissioners, to inquire whether, by the habit of the dealings between the two bankrupts, the use of their names individually, as drawers of the bills of exchange, was large enough to bind the firm; and whether it was the intention of the

parties, by the use of their names individually, to bind the firm; and also to make the like inquiry as to the same parties being acceptors of such bills. And if the assignees under the joint fiat should waive such inquiries, or if the Commissioners should find in the affirmative, then it was ordered, that the petitioner might elect; and if he should elect to prove against the joint estate, that his proof against that estate should be restored to the proceedings; and that his proof against the separate estate of *Bayley* should be expunged, the petitioner refunding the dividend he had received thereon; that the petition, as against the assignees under the separate fiat, should be dismissed; that the petitioner should pay to the assignees under the separate fiat the costs of the petition, including the costs of refunding and dividing the dividend received by the petitioner; and that the costs of the assignees under the joint fiat should be paid out of the joint estate.

1839.

Ex parte  
Law.

Ex parte WILSON.—In the matter of MALTBY.

**THIS** was the petition of an equitable mortgagee, for the usual order, and for leave to bid at the sale. The only peculiarity in the prayer of the petition was, that if the mortgagee should become the purchaser of the property, he might be excused from paying any deposit on the amount of the purchase-money, as the amount of the money due on the mortgage, according to his statement, exceeded the value of the estate.

Westminster,  
Jan. 29, 1839.

On a petition of an equitable mortgagee for leave to bid, the Court will not excuse him from paying the deposit money, if he should become the purchaser.

1839.

Ex parte  
WILSON.

Mr. *Ellison* appeared in support of the petition.

The COURT, after consulting Mr. *Barber*, the Registrar, said, that it had not been the practice of the Court to grant such an Order, and that they were unwilling to make a precedent.



Westminster,  
Jan. 29, 1839.

After the proof of a debt, but before the declaration of a dividend, the creditor received a large portion of the debt from a surety: *Held*, that this did not prevent the creditor from receiving dividends on the whole amount of his proof.

Ex parte COPLESTONE.—In the matter of SNELL.

THIS was the petition of a creditor, for an order on the assignees to pay him the amount of a dividend on a proof for 520*l*.

Mr. *Teed* opposed the petition, on the ground that the creditor had already received from a surety a portion of the debt, amounting to 300*l*., and that the creditor was therefore only entitled to receive dividends on the remainder of the debt. By the statute, the surety has a right to stand in the place of the creditor, whether he pays part, or the whole of the debt (*a*); and therefore, if the petitioner is to be permitted to receive dividends on the whole amount of the debt, the bankrupt's estate will in that case have to pay a dividend twice over on the 300*l*.

Sir JOHN CROSS.—The proof in this case having been made before the payment of the 300*l*. by the surety, it does not appear to me, that the creditor surrendered his right to receive dividends on the whole amount of his proof, because he received a portion of his debt from the surety.

(*a*) By the 6 Geo. 4. c. 16. s. 52., the surety has only a right to stand in the place of his creditor, if he pays the whole amount of the debt, "or any part thereof in discharge of the whole debt."

Sir GEORGE ROSE.—It seems to me very reasonable, that the creditor should receive dividends upon the whole amount of his proof, provided he does not altogether receive more than 20s. in the pound. The surety has no *locus standi* under the act of parliament, either on legal or equitable grounds; for there is here no evidence of any payment of the entirety of the debt, or of any partial payment in discharge of the entirety.

1839.

Ex parte  
COPLESTONE.

ORDERED as prayed, but without costs.

Ex parte HARVEY.—In the matter of EMERY and others.

THIS was the petition of an equitable mortgagee, for the usual order. It appeared, that there was an agreement in writing, accompanying the deposit of the deeds, which was dated the 15th November 1836; and there was afterwards a legal mortgage executed by the bankrupt to the petitioner, in pursuance of this agreement; but this was after the petitioner had notice of an act of bankruptcy. It was alleged also, in answer to the petition, that there was an act of bankruptcy committed in August 1836; but there was no evidence, that the petitioner had notice of this act of bankruptcy. The fiat issued on the 21st February 1837.

Westminster,  
Jan. 29, 1839.

Where a legal mortgage was executed by the bankrupt, in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and was consequently an unavailable security; it was held, that it did not operate as a merger of the equitable mortgage, and that the party was entitled to the usual order, as equitable mortgagee.

Mr. Swanston, and Mr. Anderdon, appeared in support of the petition.

Mr. Armstrong, *contra*, contended that the legal mortgage merged the previous equitable mortgage.

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Ex parte  
HARVEY.

Sir JOHN CROSS.—As there was here a period of two calendar months between the contract of the 15th November and the issuing of the fiat, and there is no evidence that the petitioner had any notice of the act of bankruptcy until after the 15th November, there is nothing to affect the validity of the equitable mortgage. The legal mortgage had not the effect of merging the equitable mortgage; for the legal mortgage, being executed after the petitioner had notice of the act of bankruptcy, was void; or at any rate, the respondents now come here to avoid it.

Sir GEORGE ROSE.—The legal mortgage had only the effect of suspending the equitable mortgage; and, being now rendered unavailable by the previous notice of the act of bankruptcy, the rights of the petitioner under the equitable mortgage are revived.

ORDER made as prayed.



GENERAL ORDER.

1839.

ON the 9th June 1837, the Lord Chancellor gave the following general direction to the Secretary of Bankrupts:—

“ All Fiats to be directed to the Court of Bankruptcy, or to the List in the country nearest to the place of residence of the Bankrupt, unless a Special Order be obtained, on affidavit, directing the Fiat to go to any other List.”

Ex parte JOHN SKERRETTE STUBBS, on behalf of the Northern and Central Bank.—In the matter of GEORGE HALL.

*Lincoln's Inn Hall, December 14, 1838. Westminster, January 12, and Lincoln's Inn Hall, April 10, 1839. Cor. Lord Chancellor.*

THIS was a petition to the Lord Chancellor, praying that he would discharge his own order for annulling the fiat in the above bankruptcy, and that a writ of *procedendo* might issue, directing the Commissioners to proceed in the execution of the fiat, notwithstanding an Order (a) of the Court of Review made in this matter, on the petition of the abovenamed bankrupt, on the 26th November last. The present petition was preferred to the Lord Chancellor under the following circumstances.

After a petition for annulling the fiat has been heard and disposed of by the Court of Review, the Lord Chancellor can only interfere in his appellate, and not in his original, jurisdiction in bankruptcy; and an appeal to remove the order on such a petition must be brought before him by way of special

On the 14th December last a motion was made to his Lordship, by Mr. *Swanston*, on behalf of the present petitioner, that his Lordship would direct, that the petitioner might prosecute his appeal from the Order of the

(a) See *Ex parte Hall*, ante, p. 405.

case, unless he shall otherwise direct; which direction will only be given under very special circumstances.

No appeal lies to the Lord Chancellor against the settlement of a special case by a judge of the Court of Review, for refusing to introduce into the case a statement of certain facts, which the appellant contended ought to be inserted in it; the 1 & 2 W. 4. c. 56. s. 3. 17. confining the right of appeal to matters of law or equity, or the refusal or admission of evidence, only; and the 3d section declaring that the determination of the judge in the settlement of the case shall be final and conclusive.

Lord Brougham's observations in *Ex parte Keys*, 1 Mont. & A. 242, 3 Deac. & C. 275, as to the Lord Chancellor's jurisdiction in all matters relating to the fiat being wholly untouched by the provisions of the 1 & 2 Will. 4. c. 56., corrected.

1839.

Ex parte  
STUBBS.

Court of Review, by way of petition, instead of by special case; when his Lordship ordered, that the petition of the present petitioner should be received, in order that the question of jurisdiction might be brought in due form before the Court.

A petition was accordingly presented to the Lord Chancellor, which, after stating most of the facts (a) alleged in the petition to the Court of Review, and the order made by that Court on the hearing of the petition, alleged that the Chief Judge was, on such hearing, of opinion that the fiat was valid in law, and that the same ought to be proceeded with; that Sir *John Cross* was of opinion, that the fiat was not valid in law, and that upon equitable grounds it ought to be annulled; and that Sir *George Rose* was of opinion, that the fiat was valid at law, but that upon equitable grounds it ought to be annulled. That the present petitioner, being advised that he was aggrieved by the order of the Court of Review, and that the order itself was erroneous, and that the fiat ought to be prosecuted, stated a special case, setting forth the several facts mentioned in the petition, for the purpose of bringing the same on for hearing, by way of appeal, before the Lord Chancellor, and applied to one of the judges of the Court of Review to have the special case settled and certified by such judge. That such special case was returned to the petitioner, with another special case, which had been drawn by the judge, and which was tendered to the petitioner, with an intimation, that his Honor was willing to settle and certify the special case so drawn by his Honor, instead of the case which had been stated by the petitioner. The petitioner alleged, that the case, as drawn by his Honor, did not state certain matters which were presented to the notice of the Court of Review on

(a) See *ante*, 405.



the hearing of the former petition, viz. the execution of an indenture, dated the 21st January 1837, whereby the bankrupt assigned certain shares in the Northern and Central Bank to trustees, in trust for the Bank; nor a debt of 1478*l.* 7*s.* 8*d.*, alleged to be due from the bankrupt to the Bank, on the balance of his banking account; and that it did not state with sufficient accuracy the nature or effect of a suit instituted by the Bank in the Court of Exchequer against the bankrupt, for an account, and for the sale of certain property mortgaged by him to the Bank. That it was stated in the same special case, among other things, that the bankrupt had committed no act of bankruptcy but the omission to enter into the bond with sureties, as required by the 1 & 2 *Vict.* c. 110. s. 8., into which act of bankruptcy he was purposely driven by his partners claiming an exorbitant debt, requiring excessive bail, beyond what he was able to procure; and that the fiat, in fact, was sued out not for the usual purposes of bankruptcy. The petitioner alleged, that these several statements were erroneous, and not supported by the allegations of the petition presented by the bankrupt to the Court of Review. That, upon the remonstrance of the petitioner, his Honor proposed to omit from the special case the statement that the bankrupt had been purposely driven into the commission of the act of bankruptcy by his partners; but his Honor declined either to introduce into the special case any statement of the indenture, or any other statement respecting the suit in the Court of Exchequer, or to make any other alteration in the special case. That inasmuch as the special case so drawn by his Honor, and so proposed to be altered by the omission before stated, raised no question whatever to be decided by the Lord Chancellor, the same was not proceeded with by the petitioner.

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The petitioner then alleged, that he was therefore without any means of appealing from the order of the Court of Review, unless the Lord Chancellor should be pleased to direct such appeal to be heard otherwise than by special case. That an Order had been made by the Lord Chancellor, founded upon the Order of the Court of Review, bearing date the 29th November 1838, whereby his Lordship had ordered that the fiat should be annulled. That the petitioner was advised, that notwithstanding the Order of the Court of Review, and the Lord Chancellor's Order thereupon, his lordship had original jurisdiction in the matters aforesaid, and that it was competent to his lordship to hear and decide upon the matters stated in the said petition, and to discharge the order for annulling the fiat, and thereupon to order that the fiat should be proceeded with.

The prayer was, that the Order of the 29th November 1838 might be discharged, and that a writ of *procedendo* might forthwith issue, directed to the Commissioners named in the fiat, commanding them, notwithstanding his lordship's said Order, and the Order of the Court of Review, to proceed with the fiat; and that the costs of the petitioner occasioned by the petition of the bankrupt, as well as those occasioned by the present application, might be paid to the petitioner out of the bankrupt's estate.

Mr. *Swanston*, Mr. *Wightman*, and Mr. *Bacon*, in support of the petition. This petition is founded on the original jurisdiction of the Lord Chancellor in those matters of bankruptcy, in which jurisdiction is still reserved to him under the provisions of the 1 & 2 Will. 4. c. 56. By section 12 of that statute, the Lord Chancellor has exclusive jurisdiction to issue a fiat; and by section 19, the Lord Chancellor, upon the reversal of

any adjudication of bankruptcy by the Court of Review, or for such other cause as he shall think fit, may order any fiat to be rescinded or annulled, and such order shall have all the force and effect of a writ of *supersedeas*. In the case of *Ex parte Keys* (a), the Court of Review had done exactly what they have done here—made an order for superseding the fiat. That case was heard on petition before Lord *Brougham*; and being a question of fact, Lord *Brougham* could not, of course, entertain the appellate jurisdiction; but, by virtue of the original jurisdiction, which his lordship said could not be interfered with by the Court of Review, his lordship administered what he considered to be the justice of the case.

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LORD COTTENHAM, C.—I do not apprehend, that Lord *Brougham* meant to lay down any general rule in that case. In fact, if the rule were taken to be, as you consider it, it would have the effect of bringing into this Court every question of *supersedeas*. The 19th section was never intended to undo all that had been previously done by the act; but it was introduced obviously for protecting the great seal from being put in the situation of being called upon to obey the order of another Court. In affixing the great seal to an order of another Court, the Lord Chancellor gives credit to the decision of the Court below; and if that is to be questioned, it must be questioned in the regular way by appeal. Thus, if an order is made at the Rolls, or by the Vice-Chancellor, which requires the authentication of the great seal, the merits of the case are not investigated, but the decision of the Court below is considered by the Lord Chan-

(a) 3 Deac. & C. 263.

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Sturess.

cellor a sufficient sanction for his affixing the great seal. The jurisdiction of the Rolls, although distinct from the jurisdiction of the Lord Chancellor, yet in many cases requires the interposition of the great seal to give effect to its orders, and this can only be through the medium of the Lord Chancellor; but it does not follow, that the Lord Chancellor has any original jurisdiction in the matter, in which the Master of the Rolls has previously adjudicated. In the present case, the 17th section of the act of parliament expressly gives the Court of Review jurisdiction to try the question, whether there shall be a reversal of the adjudication of the Commissioners, or not; but then the order of that Court cannot operate, until the great seal has acted under the 19th section; when it takes the judgment of the Court of Review as conclusive, unless it is appealed from in the regular way; and the appeal is, by the 17th section, limited to any matter of law or equity, or on the refusal or admission of evidence, as it is by a prior section of the act.

*Mr. Swanston.* The issuing of the fiat is the act of the Lord Chancellor; and there is nothing in the statute, which deprives the Lord Chancellor of his original jurisdiction over the fiat. Thus the power of annulling it, in strictness, belongs solely to the Lord Chancellor; although the Court of Review has assumed the power, and such has become the practice.

*Lord COTTENHAM, C.*—The act of parliament, by the second section, gives the Court of Review jurisdiction and authority, in express terms, “to hear and determine, order and allow, all such matters in bankruptcy, as now usually are, or lawfully may be, brought by pe-

tion or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere, except as is herein otherwise provided." Now, you have to make out that this is a matter otherwise provided by the act. If your construction of the act is the right one, every question, in which the validity of the fiat is brought in issue, may come in the first instance to the Lord Chancellor.

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Mr. *Swanston*, Mr. *Wightman*, and Mr. *Bacon*. The Court of Review has no jurisdiction over the fiat at all. All the authority it could exercise in the present matter is given by the 17th section, which directs, "that the Court of Review shall proceed to hear and decide on the said petition." What petition? Why the petition previously spoken of by the section, *for the reversal of the adjudication*,—not a petition to annul the fiat.

Mr. *Wigram*, Mr. *Anderdon*, and Mr. *Geldart*, for the respondents. All jurisdiction in matters of bankruptcy, not specially reserved to the Lord Chancellor, are transferred by the statute to the Court of Review. It was especially desirable, that the power of annulling a fiat should be vested in that Court; otherwise the Lord Chancellor would soon be again overwhelmed with a large portion of the business, from which it was the intention of the legislature to relieve him. Questions relating to superseding commissions of bankruptcy were more frequent than any others; it must therefore be inferred, that when the act gives authority to the Court of Review "to hear and determine, order and allow all such matters in bankruptcy as then usually were, or lawfully might be, brought before the Lord Chancellor,"

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the power to supersede a commission, or annul a fiat, was also intended to be given to that Court. If the Court of Review, then, had jurisdiction in the matter, the only mode of reversing its decision was by way of appeal to the Lord Chancellor, or on special case. But if it is contended that the Court of Review has no jurisdiction, then the objection could not be taken even on appeal, as it was not taken on the hearing of the petition before the Court of Review; *Ex parte Turner* (a). What is said, however, by Lord *Brougham* in the case of *Ex parte Benson* (b) is extremely strong, to show that the Court of Review had jurisdiction in this matter. His lordship there says, "With respect to the jurisdiction of the Court in all matters arising in bankruptcy henceforth under the fiat, I consider the jurisdiction of this Court is transferred to the Court of Review; and that the Court of Review could only be controlled and superintended by this Court, by an appeal in matters of law or equity in the way pointed out, either by special case, or in any other mode which, in the peculiar circumstances of the case, may seem proper." The present petition is perfectly an irregular proceeding, and ought to be dismissed with costs.

Mr. *Swanston*, in reply. We have no other object than to be heard by your lordship on the merits of this case; but difficulties occurred in bringing them before your lordship in the usual way of proceeding, namely, by special case. The order, we ask to be relieved from on the present occasion, is your lordship's own order of the 29th November, 1838, over which your lordship alone has sole and exclusive jurisdiction. The petition, though founded on your lordship's original jurisdiction

(a) 1 Mont. &amp; A. 357.

(b) 1 Deac. &amp; C. 339.

in bankruptcy, is nevertheless framed with a view to the whole merits of the case; we have therefore no wish whatever to conclude the other side, as to the merits; on the contrary, all we wish is to be heard on them.

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Lord COTTENHAM, C.—Does not the whole question resolve itself into these two branches,—had the Court of Review jurisdiction, or not? If not, then it might be wrong to allow their order to stand, being merely waste paper. If the Court of Review had jurisdiction, how can I hear a petition complaining of their order, except upon appeal?

Mr. *Swanston*. The jurisdiction has been assumed by the Court of Review, notwithstanding the provisions of the 19th section of the act of parliament, which confine the power of annulling a fiat to the Lord Chancellor. By the 12th section the Lord Chancellor has the sole power (except certain other persons acting under his appointment) to issue the fiat,—and by the 19th section he has the sole power to annul it. The power of the Court of Review is, by the 17th section, confined expressly to the reversal of the adjudication, and the other sections of the act all harmonize with that section, in confining the jurisdiction of the Court of Review to that object alone, on all questions affecting the validity of the fiat.

*Cur. adv. vult.*

Lord COTTENHAM, L. C., now delivered the following judgment (a):— April 10.

(a) The author is greatly indebted to the kindness of the Lord Chancellor, for enabling him to extract the above important judgment from his Lordship's private note-book.

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In this case, a fiat in bankruptcy having issued against *Hall*, he presented a petition to the Court of Review, praying that the fiat might be annulled with costs, and the bond assigned. The Court of Review ordered that the fiat should be annulled, and the costs paid by the petitioning creditor; upon which my order issued, annulling the fiat. Against this order the petitioning creditor presented a petition to me, praying that my order might be discharged, and that a writ of *procedendo* might issue, directing the Commissioners to proceed, notwithstanding the order of the Court of Review, and that the costs of the petitioning creditor occasioned by *Hall's* petition, which the Court of Review had ordered him to pay personally, and the costs of this petition, might be paid out of the bankrupt's estate. The petition addressed to me contains a statement of the case, as it is represented to have existed before the Court of Review, and states that two of the judges of that Court thought the fiat valid in law; but that one of those two thought that there were equitable grounds for annulling it; in which latter opinion the third judge concurred with him, but also thought it was not valid in law. And the petition states, as the reason for not proceeding by way of special case, that the learned judge declined to introduce into the special case some of the facts stated to have been in evidence before the Court of Review.

So far as the petition to the Court of Review objected to the adjudication, upon the ground of a legal objection to it, the case is precisely within the 17th section of the 1 & 2 Will. 4. c. 56.; as to which an appeal is given to the Lord Chancellor upon matter of law or equity, or on the refusal or admission of evidence, only; which appeal is by the 3rd section, as to all cases, confined in the same



manner, and is to be by special case only, unless the Chancellor shall otherwise direct.

So far as the petition to the Court of Review sought to have the fiat annulled upon equitable grounds, the case necessarily depended upon the facts. But of fact the statute constitutes the Court of Review the sole judge; the 3d section enacting, that the appeal to the Lord Chancellor shall be upon matter of law and equity, or on the refusal or admission of evidence, only; and the determination of the judge on the settlement of the case, is, by the same section, declared to be final and conclusive.

What I am asked to do by this petition is, to review, by way of appeal, the judgment of the Court below, as to the reversal of the adjudication within the 17th section,—or as to the determination of the judge in the settlement of the case, which the 3d section declares shall be final and conclusive,—and this upon a question of fact, which, by the 3d section, I am prohibited from entertaining. These provisions of the act would seem to be conclusive against my jurisdiction; not because the proceeding is *by petition*,—for, as to that, some sort of discretion is reserved,—but because it is an appeal upon matter of *fact*, and against the determination of the judge in the *settlement of the case*. But it is argued, that the case in question is an exception to the general rule; inasmuch as it concerns the fiat, over which it is contended that the act has reserved exclusive jurisdiction to the great seal. It is to be observed, that this is not an application to exercise original jurisdiction, but an appeal from the decision of the Court below; and I find no exception made, as to the powers of the Court of Review in the 2nd section, or as to the restriction of appeal

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in the 3d section, in favour of questions respecting the fiat ; but, on the contrary, the 17th section, in a matter directly affecting the fiat, not only assumes that the Court of Review has jurisdiction, but regulates the proceedings of the Court in several matters, and the mode of appealing from its decisions. It is true, that the 12th section gives to the Lord Chancellor, and those whom he may appoint, the authority to issue the fiat in the first instance, and that the 18th section gives him power in certain cases to issue a second fiat, and the 19th section also authorizes him in certain cases to rescind or annul the fiat. These cases are, first, upon the reversal of any adjudication in bankruptcy, which, by the 17th section, it is clear the Court of Review has the power to reverse; and so far it is clear, that this act of rescinding or annulling, though reserved to the Lord Chancellor, must be founded upon the judgment of the Court of Review. But this section also authorizes the Lord Chancellor to rescind or annul the fiat, for such other cause as he shall see fit ; and this provision, it is contended, gives the Lord Chancellor jurisdiction in all cases which concern the rescinding or annulling the fiat. But this section must be construed with reference to the other provisions of the act. It is well known, that petitions for superseding commissions constituted a large part of the business in bankruptcy ; and it cannot be supposed, that the act intended to reserve to the Lord Chancellor original jurisdiction over all such questions ; particularly when we find that the 17th section contemplates and regulates the mode of proceeding by the Court of Review, and of appealing to the Lord Chancellor in such matters. It was probably thought inconsistent with the dignity of the Great Seal, that the Court of Review should have the

power to annul a fiat, which had issued under the authority of the great seal. The act, therefore, of annulling was reserved to the Lord Chancellor. But it cannot be supposed, that it was intended to withhold from the Court of Review this power as to all the preliminary proceedings, particularly when the power of reversing the adjudication is expressly given to them. I do not however feel it necessary to pursue the question of original jurisdiction further; because I have before me a case of appellate jurisdiction only; as to which I am prohibited from interfering with the judgment of the Court of Review,—except in matters of law and equity, or the refusal or admission of evidence,—or with the determination of the judge in the settlement of the case; by which special case I am directed to hear appeals, and in no other mode whatsoever, unless I shall in any case otherwise direct; but this discretion, and the direction which I am so authorized to give, relate only to the manner of bringing the case before me, and cannot be used to extend my jurisdiction by way of appeal. I think the matter attempted to be brought before me, namely, the manner of settling the case, is not that which can be matter of appeal; and that I should be departing from the spirit and meaning of the act, if I were to dispense with its direction, as to proceeding upon appeals upon a special case only. The decision in *Ex parte Keys*, in 1 Mont. & A. 226 (a), is not inconsistent with this construction of the act; because the act gave to the great seal the power, if it was fit, of hearing matters of appeal from the Court of Review, otherwise than upon a special case. If the observations of Lord *Brougham* in page 242 (b) are to be understood as expressing an opinion,

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(a) And see 3 Deac. &amp; C. 263.

(b) And see 3 Deac. &amp; C. 275.

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that the jurisdiction of the Great Seal is, in all matters relating to annulling the fiat, untouched by the provisions of the act, even in cases which have been before the Court of Review, and which therefore come to the Great Seal by way of appeal,—I am not prepared to concur in that construction of the act. I do not find any such exception made in the general proposition laid down in *Ex parte Langston*, 1 Mont. & B. 142 (a). It would not be expedient to attempt to lay down any rule, as to what circumstances ought to induce the Great Seal to hear appeals from the Court of Review, otherwise than by special case. It is obvious, that if applications for that purpose were readily assented to, the mischiefs intended to be remedied by the act would be speedily restored. It by no means follows, when such permission is given, that the express provisions of the act that the Great Seal shall hear appeals only upon matters of law and equity, or the refusal or admission of evidence, are to be considered as not applicable to such a case. But, without expressing any opinion as to what might be the course to be adopted, if I were to hear this appeal otherwise than by special case, I am of opinion, that sufficient ground is not laid for my exercising the discretion given to me by the act; and that I have therefore no jurisdiction over what has taken place in the Court of Review, unless an appeal should be brought before me regularly upon a special case. The petition must be dismissed with costs.

Petition dismissed, with costs.

(a) And see 1 Deac. & C. 324.



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Ex parte EDWIN GEE.—In the matter of THOMAS  
SAWER.

Westminster,  
Jan. 26,  
May 8, 1839.

THIS petition came on again for further directions on the report of the Deputy Registrar. It was a petition of a clerk to be allowed six month's wages, under the 6 Geo. 4. c. 16. s. 48., and was first heard on the 12th June last (a), when an Order was made that the Deputy Registrar should inquire at what time, and in what manner, the petitioner quitted the service of the bankrupt. The report stated, that the petitioner lived in the service of the bankrupt for more than fourteen years; that at the time he left, his salary was 250*l.* per annum, and that it was a rising salary, beginning at 30*l.* per annum; that the petitioner received notice to leave the bankrupt's employ about the middle of February, 1837, the bankrupt having a son of sufficient age to take his journey; that in January previous the bankrupt had compounded with his creditors for 7*s.* in the pound; that the petitioner offered his services for six months, if he could be of any use to the bankrupt, but the bankrupt declined such offer, and the petitioner left in the month of February, 1837; that the petitioner had never expressed a wish to leave the bankrupt's service, but left it willingly, for the reasons stated by the bankrupt; that the bankrupt was not able to pay his salary when he left, which amounted then to 250*l.*; and that the petitioner, before the fiat issued, applied to the bankrupt for payment of this sum, which the bankrupt was still unable to pay.

A clerk, who leaves his master's service, without being absolutely compelled to do so, twelve months before his bankruptcy, is not entitled to six months' wages in full, under the 6 Geo. 4, c. 61, s. 49.

The fiat issued in January, 1838.

(a) See *ante*, p. 341.

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The petitioner now prayed, that the report might be confirmed; that a meeting might be advertized for the proof of the petitioner's debt; and that upon such proof being made, he might be paid the sum of 125*l.*, being six months' salary, out of the bankrupt's estate.

Mr. *K. Parker*, in support of the petition, contended, that the case of *Ex parte Sanders (a)*, which was cited on the former hearing, proved that it was not necessary that the relation of master and servant should exist at the very period of the master's bankruptcy, in order to entitle the clerk or servant to six months' wages under the act of parliament. The petitioner was a commercial traveller for the bankrupt; but it was decided in *Ex parte Neal (b)*, that a person of this description, engaged at an annual salary, was a servant, or clerk, within the meaning of the 48th section of the statute.

Mr. *Bacon*, for the assignees, said that the bankrupt's effects did not realize more than 150*l.*, and that a dividend was declared of only 4½*d.* in the pound; and that it was not till after that circumstance, that the petitioner made this claim. The relation of master and servant clearly ceased in March, 1837. The assignees did not wish to oppose the application, but left the matter to the discretion of the Court.

*M. K. Parker*, in reply.

Sir JOHN CROSS.—The words of the act are, “when any bankrupt shall have been indebted, at the time of

(a) 2 Deac. 40.

(b) Mont. and M. 194.

issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such clerk or servant, &c." Now, does not this mean, that the clerk or servant shall be in the bankrupt's service at the very time of the bankruptcy? I own, I feel great doubt whether the enactment must not be confined to those, who are in the actual employment of the bankrupt. We cannot call this petitioner the clerk of the bankrupt, if he left his service near twelve months before his bankruptcy. My present impression is, that the petitioner was not within the act. But I should wish a little time to consider the facts, and also the case of *Ex parte Sanders*, in order that we may be consistent in our decisions.

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*Cur. adv. vult.*

The Court this day delivered their judgment as follows. May 8.

Sir JOHN CROSS.—In this case an Order of Dividend has been regularly made of  $4\frac{1}{4}d.$  in the pound, and it is a first and final dividend; the clear produce of the bankrupt's estate amounting only to 150*l.*

Shortly after the Order was made, and before the payment of the dividend to the creditors, a notice was served on the assignees, on the behalf of the petitioner, of a claim of a debt to the amount of about 250*l.*, and of an intention to apply to this Court to stay the dividend, and to admit a proof of the debt. This petition was accordingly presented; and then, for the first time, and without any previous application to the Commissioners, or the assignees, the petitioner claimed to have a moiety of his debt paid in full, in preference to all the other creditors,—and that is five-sixths of the whole money

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ordered to be divided,—on the ground that his debt was for a year's wages, as a clerk of the bankrupt, by virtue of the 48th section of the General Act, which authorizes Commissioners to allow the servants and clerks of bankrupts, not exceeding six months' wages in full, and to admit a proof for a dividend for the residue of what may remain due on account of such wages.

On the hearing of this case, it was not disputed by the counsel for the petitioner, that this provision of the act was confined to persons in the service of a bankrupt at the time of his bankruptcy; but it was contended, that the petitioner was then virtually in the service, though not actually so, because he had left it unwillingly, and *Sanders's* case (*a*), in 2d Mont. & Ayr. was cited as an authority for that construction of the act.

The Court thereupon directed an inquiry before the Deputy Registrar "at what time and under what circumstances the petitioner left the service," and ordered the payment of the dividend in the meantime to be stayed. And the Registrar has certified, that about twelve months before the bankruptcy the bankrupt compounded with his then creditors for 7s. in the pound, and it was then agreed between him and the petitioner that he should quit the bankrupt's service, and that a year's wages, amounting to 250*l.*, should remain as a debt, instead of being included in the composition.

Accordingly, the petitioner then quitted the service, obtained another similar employment, the bankrupt's son succeeding to his place as clerk, and the trade was carried on as before for another year, when this bankruptcy took place.

On the production of the Deputy Registrar's certificate, and the further hearing of counsel, my learned

(*a*) 2 Mont. & A. 684; 2 Deac. 40.



colleague having pronounced an opinion in which I was not prepared to concur, the case stood over for judgment; and my profound respect for my learned colleague has induced me to give to it the most attentive consideration, but, I am sorry to say, without being able to bring my mind to the same conclusion. It appears to me, that the only principle on which the legislature has given a preference to the servants and clerks of bankrupts is, that they are greater sufferers than any other creditors, by the loss of their employment; and, therefore, that this is not a case within the intention, nor within the terms, of the act. And I think *Sanders's case* is wholly different from the present; and it appears to have been misunderstood, in consequence of its appearing from the report to have been decided on the ground of an *involuntary* quitting of the service. The ground on which that case was decided was, that although there was an interval of six months between the quitting of the service and the fiat, yet the servant quitted in consequence of his master having assigned all his estate and effects, and thereupon ceased to carry on his trade,—which was an act of bankruptcy—whereby the servant lost his employment, as well as his wages. But, even had I thought this petitioner entitled to a half year's wages in full, if he had advanced his claim in due time before the Commissioners, I am by no means prepared to say that this Court has original jurisdiction to admit it, and especially after an order of dividend has been duly made.

This is, I believe, the first instance of the kind; and even the practice of setting aside orders of dividend to let in further claims is of very recent date. I can find no instance prior to *Barclay's case*, which came before

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the Vice Chancellor about eight years ago, and is reported in *Montagu's Reports*; and it does not there clearly appear, whether the disallowance of the claim was owing to an omission of the creditor, or to a wrongful rejection of it by the Commissioners; but the claim was made in that case, and rejected, before the order of dividend was signed.

In the present case, the omission to prove was stated to be owing to the illness of the petitioner's solicitor, who had prepared a sufficient affidavit to prove the whole claim as an ordinary debt, but omitted to do so at the proper time. The Chief Judge having heard the petition, and the arguments of counsel, and also concurred in directing the inquiry, I have laid the certificate before him, and he thinks that the petitioner is only entitled to come in *pari passu* with the other creditors, and I am of the same opinion.

Sir GEORGE ROSE.—If the order of dividend had been conclusive against the application, or if the law had been, that the employment of the servant must be subsisting at the bankruptcy, it would have been quite unnecessary, upon the former hearing, to have directed the reference upon which the matter now again comes before us. But it is well settled, that an order of dividend made, or even acted upon, is not conclusive against a claim, in other respects admissible; and *Ex parte Sanders* is, I believe, not the only case in which it has been decided, that the discontinuance of the service before the bankruptcy, is not in itself an objection. It is a question therefore of circumstances going to this point—is the relation in which the parties stood actually severed, and how? To this question, I apprehend, we must apply the

principle upon which the remedial enactment is founded, which, as it appears to me, is to protect a class of persons who cannot, as other creditors may, guard themselves against the insolvency of their debtor,—who cannot, as others may, withhold credit, ensure payment, or exact security, upon the suspicion or alarm of insolvency—and who by considerations, both towards their debtors and themselves, are placed under restraints, which other creditors do not feel. If the service has been so dissolved, and the clerk or servant so placed, that, as if it were an ordinary creditor, you can attribute it to his own neglect, that an interval having elapsed he remains unsatisfied,—why the legislature cannot be supposed as intending to protect him, who has had the means, as any other creditor had, of taking care of himself. It was upon this view, I conceive, that the reference went; and unless upon some such view of it, it is difficult to know why it went at all. It now comes back upon a report, which in substance finds, that the bankrupt, in January 1837, became insolvent, to an extent that compelled him to put an end to his business;—that he was forced to compromise with his creditors at a composition of seven shillings in the pound;—that, to all intents and purposes, he became and was thoroughly and completely bankrupt at that time; and I doubt not—although to that the attention of the Registrar has not been directed, that specific bankruptcy might have been found—at all events, the arrangement ended, as such arrangements generally do end, in bankruptcy. Now, at this insolvency so ending in a fiat, it cannot be said that the petitioner was discharged by his employer; he did not even withdraw himself; although unpaid, he was willing to remain: and the only reason he did not do so was,

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that the bankrupt felt that he would be as incompetent to remunerate his future services, as his past. In this state of things, he remained from the actual insolvency until the positive bankruptcy—unpaid and unemployed by his master. Ought he to have enforced payment—ought he to have sued him? Could he have done so with the least prospect of success? Ought he now to suffer for not having done so? As my learned colleague, however, applies a different principle to the statute, or draws a different conclusion from the circumstances, we will go together, as far as we can, in giving to the petitioner the best order in our power, viz. by letting in his proof, and providing for the costs of the assignees and of the inquiry out of the estate.

ORDERED accordingly.

Ex parte THOMAS GOLDNEY.—In the matter of THOMAS GOLDNEY.

Westminster,  
Jan. 30, 1839.

An estate is conveyed to trustees, upon trust to permit the same to be occupied and used by G. G. for life, and after his death

by T. G. for his life, with remainders over; and it was provided, that the person who should be entitled to the use and occupancy of the mansion-house should reside and dwell therein, and use the name and arms of G., upon pain of forfeiting all benefit under the settlement. In 1819 T. G. became bankrupt, and shortly afterwards obtained his certificate. At this time, G. G., the first tenant for life, was in possession of the property, and remained so till his death in 1837, when T. G. entered on the possession. Held, that T. G. had such a life interest in remainder in this property, as passed to his assignee under his bankruptcy, liable to be defeated by the default of T. G., to comply with the conditions of the settlement; and that the Court would give its sanction to an agreement entered into between the bankrupt and the assignees, by which a reasonable allowance was to be made to the bankrupt, to induce him to serve the estate, by continuing to reside in the mansion-house, and fulfilling the conditions of the settlement.

THIS was the petition of the bankrupt, claiming an interest in certain freehold property, as not having passed to his assignees under the bargain and sale. The petition stated the following facts:—

The commission issued on the 29th April 1819; and on the 18th June following, the usual bargain and sale was executed by the Commissioners to *John Masters*, the sole assignee. On the 12th August 1819, the bankrupt obtained his certificate.

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By indentures of lease and release, bearing date respectively the 6th and 7th May 1773, and made between *Gabriel Goldney*, of Clifton Wood, in the county of Gloucester, of the one part, and certain trustees of the other part; *Gabriel Goldney* granted and released to the trustees (among other property) a mansion-house and certain freehold lands at Clifton Wood, in the county of Gloucester, upon trust to permit and suffer the same to be occupied and used by *Gabriel Goldney*, the eldest son of *Gabriel Goldney*, of Chippenham, for and during his life; and from and after his death to permit and suffer the bankrupt, the second son of *Gabriel Goldney*, of Chippenham, to occupy for and during his natural life; and from and after the determination of that estate, upon trust to permit other persons in succession to occupy and use the property for their respective lives. And from and after the determination of such special life estates and interests, upon trust that the trustees should convey the property to all and every other the sons and daughters of *Gabriel Goldney*, of Chippenham, and of the several other persons in favour of whom the limitations were made, and to their respective heirs male and female in the course of entail, the sons and daughters of *Gabriel Goldney*, of Chippenham, to be preferred before all the other persons. And upon further trust, that the trustees should receive the rents and profits of the other freehold property thereby conveyed to them, and should therewith keep in good and substantial repair the mansion-house at

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Clifton Wood, with its furniture and appurtenances, and also keep up and replenish the garden and greenhouse ; and then upon trust to pay over the residue to the person who should from time to time be entitled to the use and occupancy of the mansion-house. And upon further trust, that when any person should, by virtue of the limitations before contained, be entitled to a settlement of the mansion-house, with the appurtenances, for an estate in tail general, or other estate of inheritance, the trustees should convey and assure all the other freehold trust property unto such person, and for such estate, and with such remainder over, as was before limited of and concerning the mansion-house. By the said indenture certain leasehold premises, and certain chattels as heir looms, were also assigned to the trustees, upon trust to apply the rents and profits of the leaseholds in the same manner as the rents and profits of the freehold property, and to permit the heir-looms to remain as heir-looms annexed to the mansion-house, and be enjoyed therewith. And it was provided and expressly declared, that the person who should from time to time be entitled to the use and occupancy of the mansion-house for life, should reside and dwell therein ; and that all and every of such persons, whose surnames should not be *Goldney*, when he or she should become entitled to such use and occupancy, should use the name and arms of *Goldney*, upon pain of forfeiting all benefit under the settlement.

At the time when the petitioner became a bankrupt, *Gabriel Goldney*, the first tenant for life, was in possession and occupation of the mansion-house and other property at Clifton Wood, and the receipt of the rents and profits of the other freehold and leasehold property comprised in the indenture of settlement ; and the bankrupt was

next entitled to the occupation of the mansion-house and the other benefits of the settlement, upon the death of *Gabriel Goldney*.

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The trustees were all dead, without having executed the power that was reserved to them by the settlement, of appointing new trustees.

*Gabriel Goldney*, the first tenant for life, died on the 9th February 1837, when the petitioner entered into the possession and occupation of the mansion-house and premises at Clifton Wood, and continued still in such occupation and possession.

Seven new trustees had been appointed under the authority of the Court of Chancery, to carry into effect the trusts of the settlement; and the heir-at-law of the last surviving of the deceased trustees, and the new trustees, had, since the death of *Gabriel Goldney*, the first tenant for life, received the rents and profits of the rest of the property, amounting in the whole to 1250*l.*; out of which sum they had paid ground rents, tithes, and other charges, to the amount of 400*l.*, and also the sum of 400*l.* to the petitioner, leaving the sum of 400*l.* and upwards in their hands.

The assignee under the bankruptcy had given notice to the trustees not to pay to the petitioner the rents of the estate comprised in the settlement, and claimed to be entitled to them during the life of the bankrupt; but the bankrupt contended, that they did not pass to the assignee under the bargain and sale.

In July 1837, the assignee and the bankrupt signed certain articles of agreement in respect of the mansion-house and property comprised in the indenture of settlement, to the following effect:—

1st. That the assignee should receive, for the benefit of

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the estate, the rents of the property at Elberton, paying thereout all charges incident thereto; the net produce being estimated at 300*l.* per annum.

2d. That the bankrupt should receive the rents of all the other property for his own use, to enable him to support his occupation of the mansion-house, paying thereout all charges and disbursements, for which the property at Elberton shall not be specifically liable; this net produce being estimated at 350*l.* per annum, exclusive of the use of the mansion-house and gardens.

3d. That the assignee should pay to the bankrupt, in aid of his expenditure, on entering on the mansion-house, the net receipts of the Elberton property, accruing to the 25th March 1838, retaining thereout his costs as assignee, until the future rents should have enabled him to liquidate the same.

4th. That the foregoing arrangement should be provisional, until submitted to a Gazetted meeting of creditors, and subsequently brought under the consideration of the Court of Review for confirmation or approval; and that the bankrupt should be at liberty to take the opinion of the Court on the right of the assignee to any portion of the property under the settlement. And if the Court should adjudge the assignee to have no right or interest in the property, then the costs of both sides were to be paid out of the rents; and if the Court should adjudge in favour of the assignee, and in confirmation of the arrangement, then the assignee should defray his costs and expenses out of the monies to be received by him from the rents as before proposed, and the bankrupt was to defray his costs out of the rents apportioned to his use.

5th. That all costs necessarily incurred in maintaining and keeping possession, and on the appointment of



new trustees to the settlement, or in arranging with the heir at law of the surviving trustee, in the proposed receipt of rents, and all repairs and other expenditure necessarily performed in execution of the trust of the deed of settlement, and all costs of the trustees, &c. (so far as the bankrupt or his estate might be liable to the same), should be borne and paid equally by the two respective parties out of the rents of the whole trust estate, and charged upon the same rents accruing subsequent to the 25th March next.

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6th. The bankrupt was to enter into a covenant, when thereto required, to continue to reside and dwell in the mansion-house for his life, in compliance with the condition annexed to the enjoyment of the same; but nothing was to extend to prevent the full right of the bankrupt to obtain the opinion of the Court on the right of the assignee, as before mentioned; nor was the agreement in any manner to be used to prejudice the full enjoyment of the property by the bankrupt, free from any claim of the assignee.

7th. That inasmuch as the proportion of property allotted to the bankrupt comprised a mansion-house and premises occupied by Mrs. *Ames*, at the annual rent of 300*l.*, and her tenancy might soon determine, and a considerable loss in income be thereby sustained, the assignee should allow to the bankrupt, from the rents of the Elberton lands, one moiety of any loss sustained by reason of such premises becoming vacant, and being relet at an inferior rent.

Notice was given in the Gazette of a meeting of the bankrupt's creditors to be holden on the 8th August 1837, in order to consider the terms of the above arrangement, and to assent to or dissent from the same

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being carried into effect; but no creditor attended the meeting.

The prayer was, that it might be declared, that the estate or interest of the bankrupt, in the hereditaments and premises limited to him by the indenture of settlement, did not pass to the assignee under the bargain and sale of the bankrupt's real estate; and that the assignee might be ordered to withdraw the notice so given by him to the trustees, not to pay the rents of the said premises to the bankrupt. And that he might be ordered not to do any act, to prevent the bankrupt from receiving the rents and profits of such premises.

Mr. *Swanston*, and Mr. *Bethell*, in support of the petition. What the bankrupt claims, by virtue of the deed of settlement, is, a right to reside on one estate, and the surplus rents of the other estate. The interest, which the bankrupt took under the deed of settlement, was not an estate in remainder, but a mere personal privilege to reside in the mansion-house, and occupy the property at Clifton Wood. The legal estate of the property is in the trustees; the bankrupt had only a right to reside there, if he chose, upon the conditions contained in the deed of settlement. He might not exercise his right of choice. It depended upon his own inclination. What depends on the exercise of the human will is more uncertain than a mere possibility, if metaphysicians can recognize degrees of comparison in such abstractions. At any rate, whatever interest the bankrupt took under the settlement, if interest it can be called, was wholly incapable of alienation. In default of the bankrupt's residence in the mansion-house, or omission to comply with the conditions contained in the deed of

settlement, he was to be considered as dead, and the next party in succession was to have the privilege of residing there. Whatever rights, therefore, were given to the bankrupt by the deed of settlement, were determinable by non-residence, or non-compliance with any of the conditions therein contained. At the date of the bankruptcy, *Gabriel Goldney* was in possession and occupation of the property; and the question is, whether any thing passed to the assignees. The bankrupt's right to reside on the property did not accrue till the death of *Gabriel Goldney*, which did not take place before the 9th February 1837, eighteen years after the bankrupt obtained his certificate. Nothing, therefore, could have passed to the assignees by the assignment, for the bankrupt had then only a right to a contingent personal privilege. The bankrupt is now in possession of the property. Is he to surrender up that right to the assignees, and by default of residence let in the party next in succession, without the slightest benefit to his creditors? The settler, Mr. *Goldney*, by his arrangements for the condition and permanency of the mansion-house and domain, as a family establishment,—seems to have had greater regard for the estate, than for the individuals intended to occupy it. What, then, could the assignees take under the bankruptcy? Not the right of residence, unless by impersonation of the bankrupt, were such a thing possible. The right to reside depended on occupation; and the right to receive the rents depended on the actual residence of the bankrupt; the right to receive the rents being only subsidiary to the right of occupation. The only mode of giving the assignees any benefit would be, by supposing it possible for them to compel the bankrupt to reside on the pro-

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perty, and, by virtue of such residence, to take themselves the surplus rents of the estate. But could this Court, or any Court of Equity, compel the bankrupt to dwell in a particular place every day of his life, in order that his assignees might receive the rents and profits of this estate? Such an interest as that claimed by the assignees cannot be protected by covenant; it can only be by mandatory injunction. But there was never such an order known in the bankrupt law. The present case is very different from that, where a testator directs, that the rents of an estate are to be paid to a particular individual, to the intent that the same should not be grantable or assignable, by way of anticipation; as was the case in *Brandon v. Robinson* (a). It is more like the case of *Carleton v. Leighton* (b), and must be decided on the same principle. It was there held, that the mere expectancy of an heir presumptive or apparent was not such an interest or a possibility, as was capable of being made the subject of assignment or contract; and that no interest could therefore pass, under the bargain and sale of the Commissioners, to the assignees of such heir presumptive or apparent, in case of his bankruptcy. There was here no estate in remainder, or equitable estate, limited by the deed of settlement,—nothing but a right of occupancy, a mere personal privilege, which was incapable of calculation. Unless, therefore, there is some interest actually passing to the assignees, the Court cannot interfere with the personal rights of the bankrupt. This is not an interest passing to the assignees by the operation of the bankrupt law, being not such an interest as the bankrupt could depart withal. The bankrupt, and the party who preceded or

(a) 1 Rose, 197; S. C. 16 Ves. 429.

(b) 3 Meriv. App. 667.

might follow him, were mere tenants of the trustees, under an especial provision of complying with the conditions of the settlement. The assignee cannot comply with these conditions, and therefore he cannot claim to occupy the property, or derive the consequential benefit accruing from such occupation. If it is contended, that the assignee can require the bankrupt to occupy in the assignee's behalf, it may be asked, has the assignee a right to put the bankrupt there per force, and to keep him there, in order that the assignee may obtain some benefit? Clearly not. It is nothing but a mere personal privilege given to the bankrupt, as if he was required to wear a particular order, or to bear particular insignia.

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Mr. *Girdlestone*, and Mr. *Bigg*, *contrà*. The question is, whether the bankrupt can claim the beneficial occupation of this property as against his assignees; and if not, then, whether the agreement entered into between the bankrupt and his assignee, as set forth in the petition, is such an agreement as this Court can sanction. A different rule of construction may be applicable to the right to occupy the house and garden, from that which may apply to the right to receive the rents of the rest of the property contained in the deed of settlement. The limitations in the deed are to "occupy and enjoy" the property, not merely to "occupy and use," as stated in the petition. Now the word "*enjoy*" is of a larger signification than what is comprehended under the word "*use*." The rest of the property, subject to the trusts of the settlement, is described to be "other than the house and garden," the rents of which are limited to be paid over to such person as should, from time to time,

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be entitled to the use and occupancy of the house and garden. Now, although the right to occupy the house and garden is a personal right, it does not follow, that the right to receive the rents is a mere personal right. As long as the bankrupt exercises his right of residing in the mansion-house, he is entitled to receive the rents; but how does it follow, that the right to receive the rents is personal too? The party next in remainder might enter for breach of the condition, in not residing; but so long as the bankrupt entitles himself to receive the rents of the property by residing, so long are the rents claimable by the assignee under his bankruptcy. If the party, who for the time being should be entitled to the use and occupancy of the mansion-house, should neglect or refuse to reside and dwell therein, then it was declared by the settlement that the property was to go over. Would bankruptcy be a neglect or refusal to comply with this condition? It is submitted, that it would not; for the Courts always lean against forfeitures of this description. Thus, in *Lear v. Leggett* (a),—where stock was bequeathed in trust to A. for life, and after his death for his children, with a proviso for forfeiture of his life estate in case of alienation, disposition by sale, mortgage, or in any other manner, or in case he should charge or incumber the same by the like means, and that it should then go over to the parties next entitled,—it was held, that, on his becoming bankrupt, A.'s life interest passed to his assignees. There is a distinction between a voluntary, and an involuntary, act, in the construction of forfeiture. If an estate was limited to a party, on condition that he should reside so many months of the year in a particular house,

(a) 1 Russ. & M. 690.

and he was incapacitated by illness, or detention in a foreign prison, the condition would not be broken. We contend, in the present case, that the bankrupt has a life interest in the property, which passed to his assignee; and that the party who made the settlement has not used terms strong enough to cause the property to go over to the remainder-man, in case of the bankruptcy of any occupant. The founder of the trusts has not framed the deed properly, to carry his intention into effect, so as to prevent the operation of the bankrupt law. In *Brandon v. Robinson (a)*, which has been already referred to, Lord *Eldon* says, "There is no doubt that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not sell or alien it." In conformity with the principle here laid down, where an annuity was given by a testator to *A.* for his personal support, and it was declared that it was not to be liable to his debts, but was to be paid from time to time into his proper hands, and not to any other person, and his receipt only was to be a sufficient discharge,—it was determined, notwithstanding this limitation, that, on the bankruptcy of *A.*, the annuity passed to his assignees; *Graves v. Dolphin (b)*. The Vice-Chancellor observed in that case, that "the testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son; but the policy of the law does not

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(a) 18 Ves. 433.

(b) 1 Simons, 66.

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permit property to be so limited, that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy." The same principle was also acted upon by Sir *William Grant* in *Holyland v. De Mendez* (a). And in the more recent case of *Green v. Spicer* (b), where trustees under a will had a discretion, as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life; it was held, that his interest passed to his assignees under the Insolvent Act, notwithstanding a proviso in the will, "that he should not have power to sell, mortgage, or anticipate the income of the fund;" the Master of the Rolls observing, that the *cestui que trust* took a vested life estate, of which the trustees could not deprive him by any exercise of their discretion. We do not dispute, in the present case, that in the event of the bankrupt's default to comply with the conditions of the settlement, the right may go to the remainder-man; but what we contend for is this, that the bankrupt has not a right to occupy and enjoy, as against his assignees. We say, that he has no such right as to the mansion-house, but still less as to the rest of the property. Our argument goes to this extent, that the bankrupt took a life estate in remainder under the deed of settlement, which, on his bankruptcy, became vested in his assignee under the bargain and sale; for it is clear, from the cases cited, that he cannot have the beneficial occupation of it against his assignee. If the Court were to determine the contrary in this case, it would permit any private individual to defeat the whole policy of the bankrupt law.

(a) 3 Meriv. 184.

(b) 1 Russ. &amp; M. 395.



Mr. *Swanston*, in reply. The only question is, had the bankrupt, at the time of the bargain and sale, such an interest as passed to his assignee. Now, what was the nature of that interest? A right to reside in the mansion-house, and to receive certain rents as long as he resided there? Had the assignee a right to reside there, or, could he compel the bankrupt to do so? Whatever interest was in the bankrupt was an equitable interest; the legal interest being in the trustees under the settlement. The bankrupt had nothing but a personal privilege, and if it did not pass to the assignee by the bargain and sale, it never could pass. The cases cited by the other side merely show, that ownership carries with it the incidents of ownership. If any thing passed to the assignee, it was a mere possibility. But any attempt to pass the right to the assignee would destroy it, and the remainder-man would have a right to enter; *Doe v. Hawke* (a).

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Sir JOHN CROSS.—This case appears to me to be almost too clear for argument. A grantor, in the year 1815, settles two estates on certain persons, to take in succession, on condition that the party for the time being entitled to the property, should reside on the mansion-house, and bear the name and arms of *Goldney*. Now, the bankrupt being one of the persons specified in the deed of settlement, it appears to me, that he had immediately a vested right in remainder to this property, and had such vested right at the time of his bankruptcy; which right therefore passed to his assignee by the terms of the bargain and sale; both estates depending on the same conditions. It has been contended, that the

(a) 2 East, 481.

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condition in the settlement defeats the title of the assignee to the whole of this property; as he cannot perform it himself, nor compel the bankrupt to perform it. The question is, then, does the estate go to the assignee, notwithstanding the condition? Now, the bankrupt was the entire owner of the estate for life in remainder; though, under conditions personal and peculiar, he might forfeit it; but, as no such forfeiture had taken place at the time of his bankruptcy, I am of opinion that the whole of his life interest in the property passed to his assignee. The grantor has not provided any limitation in the deed, to prevent the operation of the bankrupt law; it does not, in fact, seem to have been in his contemplation, that any possessor of the estate would ever become a bankrupt. Such an event was not foreseen by him; and as he has not provided against it, the assignee is entitled to the whole beneficial interest of the bankrupt.

Sir GEORGE ROSE.—As the parties have both submitted to the jurisdiction of this Court, I feel no difficulty in making the order, which the Court is about to pronounce in this case. By the effect of the bargain and sale, the right to this property passed to the assignee. I take it as an undeniable proposition, that where the title of a party to an estate depends upon his neglect or refusal to do a particular act, which his bankruptcy prevents him from doing, the estate passes to his assignees by operation of law, and the remainder-man cannot avail himself of a forfeiture. Characterize the estate as you will, if it is an equitable estate and vested in the bankrupt for one minute at the time of his bankruptcy, it passes to his assignees. In the present case, however, as the bankrupt is not prevented by his bankruptcy from

fulfilling the conditions of the settlement, the assignee will take the property, dependent on the will and caprice of the bankrupt, as to his compliance with these conditions; and that, as I understand, is all that the assignee asks. The assignee cannot prevent the bankrupt from giving a title, by his own default, to the remainder-man; but the assignee has a right to prevent the bankrupt from holding the estate for his own benefit. With respect to the agreement that has been entered into between the assignee and the bankrupt, as to the occupation of this property and the receipt of the rents, it might have been a question for the Commissioner to examine into that agreement, for the purpose of ascertaining how far the same was beneficial to the estate; but, as the assignee has endeavoured to take the opinion of the creditors on the subject, there is no impropriety in the Court interfering to afford their sanction to such agreement. A reasonable allowance was requisite to be made by the assignee to the bankrupt, in order to induce the bankrupt to serve the estate, by continuing to reside in the mansion-house, and fulfilling the conditions imposed under the deed of settlement. It appears to me, that the justice of the case will be satisfied, if we declare that the property passed to the assignee by the bargain and sale, and that the agreement entered into shall have the sanction of the Court.

Sir JOHN CROSS.—I wish to add one word, as to the jurisdiction of the Court in this case. I perfectly agree, that we have no jurisdiction over the trustees, or the remainder-man. All that we now do is merely between the bankrupt and the assignee.

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The ORDER was, that the estate or interest of the bankrupt, of and in the whole of the hereditaments and premises comprised in the indenture of settlement, passed to his assignee, under or by virtue of the indenture of bargain and sale; that the bankrupt, and the assignee, should be at liberty to carry into effect the agreement or arrangement entered into between them, as mentioned in the petition; and that the costs of the said parties respectively be paid and provided for in the manner thereby directed.

Serjeants' Inn  
Hall, March 7,  
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In the matter of JOHN HEWITT.

The Court refused to allow a fiat to be directed to the place, where the bankrupt had formerly resided and traded for three years up to 15th June 1837, and where he had become largely indebted to persons also residing there, notwithstanding he had since that period had no permanent place of abode, but had resided only for a few months together in five different and distinct parts of the kingdom.

MR. F. BAYLEY applied, on behalf of the petitioning creditors in this case, that the fiat might be directed to Commissioners at East Retford, instead of to Commissioners at Liverpool, on the following grounds, which were stated on affidavit,—namely, that the bankrupt had carried on business at East Retford in partnership with one *R. L. Hewitt*, from 1834 to the 15th June 1837, and had not since had any permanent residence, but travelled about the country, occasionally staying a few months in different places, where he resided in lodgings, without any house of his own; that the bankrupt was indebted very largely to creditors residing at or about East Retford, and was not indebted in any considerable amount to creditors in other places; and that it would be for the benefit of the general body of the creditors, that the fiat should be executed at East Retford, which had been not only the place of the bankrupt's last permanent residence, but was also the residence of his late partner in

business. The bankrupt was described in the docket papers, as "late of East Retford in the county of Nottingham, afterwards of Orpington in the county of Kent, afterwards of Mecklenburgh Square, London, afterwards of Kensington in the county of Middlesex, afterwards of Kenegie in the county of Cornwall, and now of Liverpool in the county of Lancaster." From this description, it was submitted that it plainly appeared, that if the bankrupt had carried on trade any where since he left East Retford, he could not have done so to any extent; whereas at East Retford he had traded and resided for several years, and had incurred debts to a large amount, of which two alone amounted to the respective sums of 3121*l.* and 800*l.*

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HAWITT.

The COURT said, that they did not think there was sufficient ground for departing from the usual practice.

Motion refused.

Ex parte NAINBY.—In the matter of NAINBY.

THIS was the petition of the bankrupt, praying that a certain agreement which he had entered into with his assignees might be carried into effect, and that the assignees might be restrained from proceeding with the sale of certain property of the bankrupt. The agreement was dated the 29th March 1838, by which the bankrupt, and one *Maria Williamson*, as his surety, engaged to pay

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pursuance of this agreement, 10*s.* in the pound was paid, and the assignees had a fund sufficient to pay the remainder; but were, nevertheless, proceeding to sell certain property of the bankrupt. On a petition by the bankrupt to restrain them from so doing, the Court declined to make any order; as the requisitions of the composition contract clause had not been complied with.

The bankrupt, and his surety, entered into an agreement with the assignees to pay all the creditors 20*s.* in the pound, in consideration of which they agreed that the fiat should be annulled. In

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all his creditors 20s. in the pound, with interest on their respective debts ; in consideration of which the assignees agreed, on the part of themselves and the creditors, that the fiat should be annulled ; but it was provided, that if default should be made in the performance of the agreement by the bankrupt, or his surety, then the fiat should be proceeded with ; and the assignees agreed to release the property of the bankrupt from all claims under the fiat, in case the 20s. in the pound and interest should be paid by the bankrupt, or his surety. It appeared, that in pursuance of this agreement, the sum of 800*l.* had been paid to the official assignee by *Maria Williamson*, the surety ; that a dividend of 10s. in the pound had been already declared ; and that the official assignee had sufficient in his hands to make up 20s. in the pound to all the creditors who had proved under the fiat, together with interest, and costs ; notwithstanding which the assignees were proceeding to sell a rectory and tithes belonging to the bankrupt ; which this petition was intended to prevent.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition. The Court will not sanction the gross injustice of the assignees, in departing from this agreement ; as there has been no default whatever, on the part of the bankrupt, or his surety. [Sir *George Rose*. It is very doubtful, whether the agreement is not void ; as it is a private agreement between these parties to suspend the working of the fiat.] The composition contract clause, in the 6 *Geo.* 4. c. 16. s. 133., provides, that if the bankrupt, or his friends, shall make an offer of composition, or security for such composition, which nine-tenths in number of his creditors shall agree to accept, the Lord Chancellor may

supersede the commission. In the present case, there is something more than a composition; for the agreement is to pay all the creditors their debts in full; and the validity of such an agreement can hardly be disputed.

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Mr. *Anderdon*, and Mr. *Bethell*, appeared for the assignees.

Sir JOHN CROSS.—It is not necessary to give any opinion on the validity of the agreement, or the conduct of the assignees; as it appears to me that the application of the petitioner is premature. He says, that there is enough to pay all the creditors who have proved 20s. in the pound on the amount of their debts; but, as it appears that there is a meeting of the Commissioners to-morrow, to declare a dividend, when other creditors may come in and prove their debts under the fiat, it is not so clear, that there is enough to pay all the creditors who may prove the amount of 20s. in the pound.

Sir GEORGE ROSE.—The argument in support of the petition is, that the assignees can, of their own authority, enter into an agreement to suspend the proceedings under the fiat, on an offer of the bankrupt and his friends, without complying with the requisitions of the act of parliament. Now, before any agreement of this sort can be considered as binding, there are several preliminaries required by the composition contract clause. In the first place, the bankrupt must have passed his last examination. 2, The proposal must be made at a meeting of creditors, of which twenty-one days' notice is to be given in the Gazette. 3, Nine-tenths in number, and value, of the creditors present, must agree to accept the proposal;

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and 4, There must be another meeting to decide upon the proposal, of which the like notice must be given, and at which the like proportion of creditors are required to consent. As none of these requisites have been complied with by the bankrupt, he cannot call on the Court to enforce any agreement which he may have entered into with the assignees for superseding the fiat.

No ORDER. Costs of both parties out of the estate.

Serjeants' Inn
Hall,
March 13, April
27, 1839.

Ex parte REUBEN TERREWEST.—In the matter of JOHN
POYNTER.

The petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period, at the option of the bankrupt; but so as not to exceed the period of eighteen months in the whole; the bankrupt under taking to pay 7½ per cent. interest, and 3*l.* per cent. for insurance. The note was renewed four times successively; and on each renewal, the same rate was deducted for interest and insurance. *Held*, that this transaction was not protected by the 3 & 4 Will. 4. c. 98. s. 7., which allows any interest to be taken on a bill or note not having more than three months to run; and was, consequently, usurious, and the note incapable of proof.

THIS was the petition of a creditor, praying that certain proceeds might be paid to him from the sale of an estate, in reduction of his debt, and that he might prove for the residue, under the following circumstances:—

In July 1834, the bankrupt, having occasion for a loan of 1600*l.*, applied to the petitioner, who was a solicitor, to procure the same for him, on the mortgage of some property, which the bankrupt was entitled to in right of his wife, and which he intended shortly to sell. Some difficulty arising as to the bankrupt's title, the petitioner offered to advance the money himself to the bankrupt, on the security of the bankrupt's promissory note, payable three months after date, and renewable, from time to time, at the option of the bankrupt, for a period not exceeding

eighteen months, upon the bankrupt agreeing verbally to pay interest at the rate of $7\frac{1}{2}$ per cent. per annum, and 3l. per cent. more for insuring the bankrupt's life, until the estate should be sold. These terms were agreed to by the bankrupt; who accordingly, on the 9th July 1834, gave to the petitioner a promissory note for the 1600l., payable three months after date, returning 42l., the amount of the interest and insurance, for three months, at $10\frac{1}{2}$ per cent. to the petitioner. The object of limiting the time for payment of the note to three months, and agreeing to renew it for a similar period, was, in order to bring the case within the provisions of the 3 & 4 Will. 4. c. 98. s. 7., which exempt bills or notes, not having more than three months to run, from being subject to the usury laws. There were four successive renewals of this note, for three months, on payment of the same rate of interest for that period; but the first note was not in fact renewed, until three weeks after it became due, when a like rate of interest was taken for the three weeks. The last note was dated the 25th August 1835; and on this note the petitioner claimed a balance due to him of 1137l. 1s. 8d. After this last note had become due, the bankrupt deposited with the petitioner the title deeds relating to a small freehold property in the county of Essex, which he was entitled to in right of his wife, as a collateral security for what was due on the note.

The fiat issued on the 4th May 1837.

The petitioner had agreed with the assignees, that the freehold property should be sold, and the proceeds paid into the hands of the official assignee; who, after deducting the expenses of the sale, was to pay the residue towards satisfaction of the claim of the petitioner, in case he should establish the same within a certain period. In

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pursuance of this arrangement, the assignees had sold the property for 236*l.*, and had received the sum of 26*l.* for rent, which it was agreed should be paid over, upon the same terms as the purchase-money.

The prayer was, that after payment of the costs of the assignees and the petitioner out of the sum of 262*l.*, in the hands of the official assignee, the official assignee might be ordered to pay the residue to the petitioner; and that the petitioner might be at liberty to prove for the balance of his debt of 1137*l.* 1*s.* 8*d.*

Mr. *Anderdon*, in support of the petition. This case falls within the 3 & 4 *Will.* 4. c. 98. s. 7., which enacts, "that no bill of exchange, or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive, or allow interest, in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange, or promissory note, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons drawing, accepting, indorsing or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture." It is contended, on the other side, that as the bills in this case were renewed several times after they were due, the loan was in fact for a period of more than three months, and so not within the provisions of the statute. But, as no one bill had more than three months to run,

the transaction appears to be perfectly within the scope and meaning of the new statute.

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Mr. *Swanston*, and Mr. *J. Russell*, *contra*. In order to bring this case within the statute, the interest taken by the petitioner should have been on a *bonâ fide* discount of a bill for three months, and not on a loan of money for a period of eighteen months. The creditor is only entitled to take more interest than 5*l.* per cent., where the money is lent for a period not exceeding three months, and not for a longer time. The bill that was originally given by the bankrupt, for the amount of the loan, was never presented for payment, nor was it intended that it should be paid ; not one of the bills, in fact, was presented, when it arrived at maturity. Interest, at the rate of 10½*l.* per cent., was not only paid for the time each bill had to run, but for the interval between the time when each bill fell due, and the time when it was renewed. In *Ex parte Knight* (a), which was a question under the same act of parliament, it was observed by Sir *John Cross*, that the statute repealed no previous law in force for the prevention of usury, being merely intended as an exception to that law. And Sir *George Rose* also said, that where there was any artful contrivance in the case, and the bills were given as a mere pretence or shift for usury, a case of this kind would not be within the statute. The first bill, in the present case, fell due on the 12th October 1834, and was not renewed until the 8th November, during all which time 10½*l.* per cent. was paid on the original loan. Nor, when the next, or any subsequent, bill was given, was there any new loan ; but the original

(a) 1 Deac. 466.

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loan still continued, on which 10½l. per cent. was paid and charged during the whole period of eighteen months. We submit, therefore, that the transaction is altogether colourable, and does not fall within the exceptions of the 3 & 4 Will. 4. c. 98. s. 7.

Mr. *Anderdon*, in reply. The debt now claimed by the petitioner is on the last promissory note, dated the 26th August 1835, which was given in consideration of the previous note remaining unpaid. The mere renewal of a bill or note is not a loan of money, within the usury laws.

Sir JOHN CROSS.—It seems to me, that there are two questions arising out of this case, which I should wish for further time to consider ; as they depend on the construction of a new act of parliament, which has not hitherto received much interpretation from the Courts. The first question is, was the real contract between these parties an advance of money for an uncertain time; and the promissory notes, which were renewable every three months, a mere contrivance to give the lender a claim to more than 5l. per cent. for interest. The second question is, as to the effect of the last renewal, when the petitioner does not give any money, but only forbearance. I offer no opinion on the case at present, but merely mention these points as worthy of consideration.

Sir GEORGE ROSE.—It is impossible, I think, to consider an enactment more guarded, than the 7th section of this act of parliament, in limiting the exemption from the penalties, under the usury laws, to transactions only of money passing on a bill or note, “ payable at, or

within, three months from the date thereof, or not having more than three months to run." The only question is, what was the real contract between these parties? Was it a *bonâ fide* discount of a note not having more than three months to run,—or was it a loan for 1600*l.* for eighteen months? The common course, however, in all these cases, and what appears to me the best form of proceeding, is, to allow the question to be tried in an action at law.

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*Cur. adv. vult.*

Sir JOHN CROSS this day delivered the judgment of the Court.

April 27.

In this case, the petitioner claims a debt of 1137*l.*, the residue of a loan of 1600*l.*, secured by the bankrupt's promissory note; and the question is, whether the contract was usurious.

The circumstances of the case, as stated by the petitioner, are as follows. The bankrupt, about two years before his failure, had occasion to borrow a sum of 1600*l.* on a mortgage of an estate, which he intended, at a convenient opportunity, to sell. He applied to Mr. *Terrewest*, a solicitor, to procure the loan. Some impediment arose about the title; and the solicitor then offered to advance the money himself on the bankrupt's promissory note, payable three months after date, and renewable, from time to time, at the option of the borrower, for a period not exceeding eighteen months, the bankrupt agreeing verbally, to pay interest at the rate of 10½*l.* per cent. per annum, until the estate should be sold.

The petitioner further states, that the money was to be lent on such renewable notes, in order to bring the

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matter within the new act of parliament, meaning the 3 & 4 Will. 4. c. 98. s. 7., which authorises *any rate of interest* to be paid, on money advanced upon bills or notes payable within three months. The money was accordingly advanced to the bankrupt, on the 9th July 1835, and he thereupon gave his first promissory note, payable three months after date, and returned the lender 42*l.*, the amount of the stipulated interest for three months. That note was not immediately renewed upon its becoming due, nor till about three weeks afterwards. It was then renewed for the next three months, on payment of the same rate of interest for that period, and a like rate for the interval of three weeks. And in this way, four successive renewals were made, and each time a similar payment. And it is on the fifth note, the present claim is made, for a balance of principal and interest, the residue having been paid.

There are two objections to this claim. First, that the transaction is not in conformity to the act of parliament; and, secondly, that if it were, the form was merely colourable. And we are of opinion, these objections are well founded.

The act appears to be applicable only to bills and notes, existing at the time the contract is made, for discounting, negotiating, or transferring the same, and to loans specifically made thereon. But no money was advanced on this fifth note. It was drawn, and interest at the rate of 10½*l.* per cent. was paid, in consideration of the forbearance of a pre-existing debt,—a case which, if real, does not seem to come within the intention of the act; for, if so, it would be applicable to all simple contract debts, and, in effect, repeal all the laws made for the prevention of usury in such contracts.

But, be that as it may, we are of opinion, that, in fact, the loan was advanced, and the interest paid, on one entire and continuous contract; and that the fabrication of a series of notes, renewable every three months, instead of a single note for a longer, or an indefinite time, was merely a shift and colourable contrivance to evade the usury laws, which no Court of Law or Equity can sanction.

The petitioner's claim must therefore be rejected, as regards the debt upon the note, and consequently as regards the real security subsequently given, and the petition be dismissed with costs (a).

(a) See *Berrington v. Collis*, 5 Bing. N. C. 322.

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Ex parte DAVID SMYTH and others.—In the matter of  
THOMAS STEEL, and JOSEPH BRADBERRY STEEL.

Serjeants' Inn  
Hall,  
March 14 & 15,  
1839.

THIS was a petition of assignees to expunge a proof, under the following circumstances:—

The bankrupts being, in the year 1832, in partnership with their father, *Thomas Steel*, the elder, as silk and cotton spinners, at Stockport, in Cheshire, it was proposed that the firm should open a banking account with the Manchester and Liverpool District Banking Company; and in order to secure any balance that might become due on such banking account, *Thomas Steel*, sen., proposed

A., B., and  
C. carrying on  
business in part-  
nership, in pre-  
mises belonging  
to A., A ex-  
ecutes a mortgage  
of the property  
to a Banking  
Company, with  
a power of sale,  
for securing  
6000*l.*, the a-  
mount of ad-  
vances to the  
partnership by  
the bank. A.

afterwards dies, having devised the property to B. and C.; who, becoming insolvent, make an assignment of all their estate and effects, in trust for their creditors; and the trustees, with the sanction of the Bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the Banking Company the 6000*l.* by yearly instalments. A fiat afterwards issues against B. and C., under which the Bank prove for the whole amount of their debt, including the 6000*l.* On a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be paid into Court, subject to further order.

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to execute a mortgage of certain freehold estates, comprising the mill or factory upon which the partnership business was carried on. In pursuance of this arrangement, by indentures of lease and release, and assignment, bearing date respectively the 12th and 13th August 1832, and made between *Thomas Steel, sen.*, of the first part, *Thomas Cartwright* of the second part, the said *Thomas Steel, sen.*, *Thomas Steel, jun.*, and *Joseph Bradbury Steel*, of the third part, and *S. P. Humphreys*, and *James Newton* (the trustees of the Bank), of the fourth part; the said freehold estates, comprising the said mill or factory, were granted and released by *Thomas Steel, sen.*, and the steam engines and fixtures belonging to the mill were thereby assigned by him to *S. P. Humphreys* and *James Newton*, subject to a previous mortgage for 3000*l.*, upon trust to make sale, and absolutely dispose of the said premises; and, after making certain payments therein expressed out of the proceeds of the sale, to retain for the Banking Company all the monies which should be owing from *Thomas Steel, sen.* and the two bankrupts, or any two or one of them, on the balance of their or his account current with the Bank, either for money paid or advanced, or to be paid or advanced by them unto *Thomas Steel* and the bankrupts, or any two or one of them, or for any monies which should be secured by any bond or bill of exchange given by *Thomas Steel* and Sons, or any two or one of them, or by any promissory note, guarantee, or other contract whatsoever, with interest for the same sums of money, after the rate of five per cent., with commission and other usual bankers' charges. And the application of such monies was not to be restricted to any particular items or parts of account current with *Thomas Steel* and Sons, or any



two or one of them, but generally, or particularly, and in such manner as the Banking Company should, in their discretion, think proper; provided that the principal money, secured by and to be ultimately recoverable by means of that security, exclusively of any sums of money to be paid or advanced for the insurance of the buildings from fire, should not exceed 6000*l.*; and subject to and after the above retentions and payments, with an ultimate trust for *Thomas Steel*, sen. It was also provided, that the security was to extend to cover any sums of money which should, for the time, constitute the balance due from *Thomas Steel* and Sons, or any two or one of them, until the principal monies to the full amount before-mentioned should have been actually recovered or satisfied, by means of the security therein contained. There was likewise a covenant contained in the indenture, on the part of *Thomas Steel* and Sons, to pay to the Banking Company immediately on demand, or within one calendar month after notice, all monies then due and owing on the balance of the account current, not exceeding in the whole the sum of 6000*l.*, together with all costs.

*Thomas Steel*, sen. died in February 1837, having by his will devised his real estate, including the mill, factory, and fixtures, before mentioned, unto the bankrupts, as tenants in common in fee simple. Shortly after his death, the bankrupts became insolvent, and assigned and conveyed all their property to trustees for the benefit of their creditors, with a power of sale. *Thomas Walmsley*, the principal acting trustee, was also one of the directors of the Banking Company, and the Banking Company were at that time creditors to a much larger amount than 6000*l.* On the 20th October 1837, the trustees endeavoured to sell by auction the equity of redemption of the above-

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mentioned freehold property; but, there being no adequate bidding, the same remained unsold. A proposal was afterwards made by a Mr. *John Lees* to purchase the estate for 9000*l.*, the purchase-money to be paid by yearly instalments of 1000*l.* This proposal was communicated to Mr. *Walmsley*, in his character of director of the Banking Company, and as one of the trustees under the trust deed, who desired that it might be reduced to writing, for the purpose of being submitted to the consideration of the board of directors of the Banking Company. In consequence of this suggestion, the following proposal was signed by Mr. *Lees* :—

“ I propose to become a purchaser of the Neap Ridings Mill, and all the hereditaments and premises comprised in the third and fourth lots in the advertisement for sale of the property belonging to Mr. *Thomas Steel*, and Messrs. *Thomas Steel* and Sons, on the 19th October instant, at the Warren Berkely Arms Inn, in Stockport, including all the particulars mentioned in the conditions of sale of both those lots, and subject to those conditions, so far as they are applicable to a sale by private contract, at the price or sum of 9000*l.*, provided and upon this express condition, that the first mortgage for 3000*l.* be allowed to remain upon the security of the premises; and that the Manchester and Liverpool District Banking Company, the second mortgagees, consent to receive the remainder of the purchase-money, with interest at 5*l.* per cent. per annum, by annual instalments of 1000*l.* each, until the whole be paid; the first instalment to become due at the expiration of two years from the execution of the conveyance of the said premises, and each succeeding instalment to be paid at the expiration of each suc-

ceeding year from that time. This offer to be accepted on or before six o'clock in the evening of Monday next, or not to be binding upon me.—24th October 1837.

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On this proposal being submitted to the Board of Directors of the Bank, it was agreed to, "on condition of the price of the cottages, about 950*l.*, also included in the said mortgage, being paid into the Bank;" and a resolution to that effect, signed by Mr. *Walmsley*, as the chairman of the board, was entered in the book of proceedings of the Stockport branch of the Banking Company. In consequence of this resolution, the solicitors of the trustees proceeded to conclude an agreement with Mr. *Lees* for the sale to him of the property; and for that purpose an agreement in writing, dated the 26th October 1837, between the bankrupts of the one part, and Mr. *Lees* of the other part, was, thereupon, signed by the respective parties; which agreement embodied the proposal of Mr. *Lees*, and the resolution of the board of directors. The petitioners alleged, that this agreement was made by the bankrupts with the full sanction of the trustees, and that all parties well knew that the bankrupts were wholly incompetent, of their own authority, to enter into and complete any such contract, and considered the same as in effect the contract of the Banking Company, and made for their benefit, and in the full belief that the Banking Company would give effect to the same, when required so to do. It was alleged that Mr. *Walmsley*, on the part of the Bank, approved of the agreement; and Mr. *Lees* paid to the bankrupts two sums of 635*l.* and 300*l.*, in part of the first instalment, and was shortly afterwards put in possession of the property,

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and accepted as the purchaser by the Bank. The petitioners contended, that the Bank were bound to give effect to the agreement, and to accept a mortgage security upon the property, with the covenant of *John Lees*, for payment of the purchase-money by instalments, as expressed in such agreement; and that the same was in substitution of, and necessarily worked a satisfaction or extinguishment of, the debt of 6000*l.* secured by the indentures of mortgage of the 12th and 13th August 1832, and was consequently, to that extent, a discharge of the bankrupts in respect of the amount or balance due upon the banking account.

In consequence of difficulties arising in regard to the execution of the trust, a fiat was issued on the 27th March 1838 against the two bankrupts, as surviving partners of *Thomas Steel* the elder; under which the Bank proved against the joint estate a sum of 864*l.* 9*s.* 6*d.*, as the alleged balance of the banking account, having only given credit for the two sums of 635*l.* and 300*l.* paid by *John Lees*, but without having deducted, as the petitioners contended they ought to have done, the sum of 6000*l.* A draft of the intended conveyance of the equity of redemption of the property was afterwards approved of by the solicitor to the Bank, as well as the draft of a mortgage deed to be executed by *John Lees*. Application was afterwards made to the Commissioners to expunge the proof, in regard to the 6000*l.*, on the ground that the mortgage security ought to have been realized before such proof was admitted, and that the debt to that amount was in effect extinguished; but they only consented to reduce it, as to a sum of 1425*l.* 6*s.*, in respect of certain bill transactions, declining to reduce it further for the following reasons; namely, that there

was nothing to show that the Bank intended to release the bankrupts from the debt of 6000*l.*, but that *Lees* was only an additional security for the payment of it; and that the Commissioners were bound by the decision in *Ex parte Hornden* (a).

The prayer was, that the proof of the Bank, as to so much as was constituted of the sum of 6000*l.*, might be expunged or reduced, and that all dividends received on such proof might be refunded.

In answer to the allegations in the petition, it was sworn by Mr. *Walmsley*, that the proposal for the purchase of the property by Mr. *Lees* was considered by Mr. *Walmsley*, in his character of a creditor in his own right, and in that of his partner, and as one of the trustees under the trust deed, but not in his character of director of the Bank; that he considered Mr. *Lees* as standing in the place of *Thomas Steel*, the mortgagor of the property, in respect of the mortgage debt of 6000*l.*; that he on several occasions stated to the trustees, and to various creditors of the bankrupts, that, in the event of a bankruptcy, the Banking Company would still be entitled to prove for the whole amount of their debt, including their mortgage, and that such claim was never disputed by the trustees, or the creditors, to whom that statement was made; and that the Bank had no intention whatever of giving up any claim to which they were entitled, in the event of a fiat being issued against the bankrupts.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. The Bank, being mortgagees of this property, with a power of sale, of course, no sale of it could take

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place, without their assent. They consented to *Lees* becoming the purchaser of the property, upon the terms stated in the agreement. If he had paid the whole 6000*l.*, the mortgage would consequently have been discharged; but, as the Bank chose to agree that the purchase-money should be paid by yearly instalments, this new agreement with the purchaser must be taken to be in satisfaction of the original mortgage. [Sir *John Cross*. It is not shown in the petition, that the mortgage debt due from the bankrupts was transferred to *Lees*, the purchaser.] The petition does not allege it; but that is the inference of law. [Sir *George Rose*. You must show, either that the bankrupts were the agents of the mortgagees, or that the mortgagees, by the adoption of the agreement made with *Lees* by the bankrupts, had postponed their right to the immediate payment of the money due on the mortgage.] The mortgagees, by allowing a conveyance of the estate to be made to *Lees*, have taken from the mortgagor the means of paying the debt. The mortgage itself will be gone, by the execution of the purchase deed by the Banking Company. It was a mortgage, with power of sale. Then, who were the vendors of the estate, on the contract with *Lees*? Why, the Banking Company; who must therefore be taken to have been satisfied with the security of the payment of the purchase-money by instalments. It appears, also, that the solicitor to the Banking Company took the acknowledgment of the wife of *Jos. Bradbury Steel*, in regard to the conveyance to *Lees*; which is evidence that it was approved of on the part of the Bank.

Mr. *Cooper*, and Mr. *Bacon*, *contrà*. The Banking Company were not the vendors of this property, but the

trustees under the trust deed, who submitted for the consideration of the Company the proposal of *Lees* to become the purchaser. It is sworn by Mr. *Walmsley*, that the Bank never intended to give up their claim against the bankrupts; in addition to which, the managing clerk of the Bank has deposed, that the two sums of 600*l.* and 300*l.*, which were the proceeds of the sale of the cottages, were entered in the Bank books, as being “*in part of mortgage.*” This shows that they did not intend to give up their rights under the original mortgage. It is sworn, also, by the solicitor to the Bank, that the taking by him of the acknowledgment of the wife of *J. B. Steel*, was done in his character of a Commissioner for taking the examinations of married women to conveyances of property, and had no reference to his situation as the solicitor of the Banking Company. It was decided in *Ex parte Bowden (a)*, where a joint creditor took an equitable mortgage from one of two partners, as a security for his debt, after which that partner died, and the other became bankrupt, that the creditor might prove the amount of the debt, without the previous sale of the security. In this case, therefore, the Bank had a right to prove for their whole debt, retaining any collateral security they might hold by virtue of the mortgage from *Thomas Steel*, senior. The mortgage is from him alone; but the right of proof claimed is against *Thomas Steel*, junior, and *J. B. Steel*; and any consent of the Bank to the sale of the estate mortgaged by *Thomas Steel*, senior, will not affect their right of proof against the joint estate of *T.* and *J. B. Steel*.

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Mr. *Swanston*, in reply. The question resolves itself

(a) 1 Deac. & C. 135.

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to this: Are the deeds, which have been prepared to convey the property to *Lees*, the purchaser, fit and proper deeds to be executed by the Bank, according to the agreement of the assignees with *Lees*, and the resolution of the Board of Directors of the Bank? He was then stopped by the Court.

Sir JOHN CROSS.—The approval by the solicitor for the Bank of the draft of the two deeds, which were to form the intended conveyance to *Lees*, and the intended mortgage from him to the Bank,—show that it was the intention of the Bank to carry into execution the agreement entered into with *Lees*, in pursuance of the resolution of the Bank. That is an important circumstance, which did not strike me so much before.

Sir GEORGE ROSE concurring, the Court made the following

ORDER, That the proof should remain upon the proceedings; and that the dividends upon the 6000*l.* should be paid by the assignees into the Bank, with the privity of the Accountant in Bankruptcy, to be laid out in the purchase of 3*l.* per cent. annuities, the trusts whereof were to be declared subject to further order; the costs of both parties to be paid out of the estate.





Ex parte RICHARD BATES PARR.—In the matter of  
RICHARD B. PARR.

IN answer to the allegations contained in a pending petition of the bankrupt, to annul the fiat, the petitioning creditor had made an affidavit, to which certain exhibits were annexed, and to which the affidavit referred, being extracts and copies of accounts, and other papers, relating to the amount of the petitioning creditor's debt.

Mr. *Swanston*, and Mr. *J. Russell*, now moved, that copies of these exhibits might be furnished to the bankrupt, at his expense. In equity, a bill of discovery would lie for the production of exhibits of this description; and, in this Court, the practice is to allow one of the parties to a petition to inspect the documents, which are referred to by the other party. If this application is refused, a party may make an affidavit, referring for any thing material to an annexed paper, and the other side be left in perfect ignorance of what he is required to answer.

Mr. *Bethell*, *contra*. The affidavit in question states, that the bankrupt was indebted to the petitioning creditor on a bond, the whole particulars of which are given in the affidavit. What right, or interest, then, has the bankrupt to call for copies of these documents? They are not documents between the parties, but those which belong exclusively to the petitioning creditor. In *Es parte Arnaby* (a), this Court decided, that although documents are referred to in an affidavit, this does not

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Where an affidavit, in answer to a petition, referred to certain exhibits, which did not appear to be mutual accounts or documents between the parties, the Court refused an application of the petitioner to have copies of them furnished to him, before the hearing of the petition.

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give the other side an absolute right to their production, but that it was a matter for the discretion of the Court; and where a motion was made for this purpose, or that copies might be delivered, before the hearing of the petition, the motion was refused with costs. That case is decisive of the present application.

Mr. *Swanston*, in reply. In *Ex parte Arnsby*, the papers referred to by the affidavit were mere unconnected documents. In the present case, any statement of the account between the parties becomes, in effect, a part of the affidavit.

Sir JOHN CROSS.—The question is, in this case, whether we have been furnished with a sufficient guide for departing from the usual course. It is not, I find, in the usual course, to give copies of accounts annexed to an affidavit. If the Court should be of opinion at the hearing of the petition, that the document annexed to this affidavit is a mutual account between the petitioning creditor and the bankrupt, and that the latter ought to have a copy of it, to enable him to answer the statement in the affidavit, the Court will then take care that he has either an opportunity of inspecting the account, or that he shall be furnished with a copy of it.

Sir GEORGE ROSE.—It is not right, that we should sanction an application of the bankrupt, to fish out what evidence the petitioning creditor has, in opposition to the bankrupt's petition to annul the fiat.

Motion refused.



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**Ex parte CHARLES COBHAM and another.**—In the matter of **THOMAS HALLS.**

*Serjeants' Inn  
Hall,  
March 15, 1839.*

**THIS** was the petition of the executors of an equitable mortgagee for the usual order.

It appeared, that the bankrupt had, on the 31st March 1835, deposited with the testator the title deeds relating to seven leasehold houses at Islington, for securing the sum of 200*l.*, and that there was a regular memorandum in writing accompanying the deposit. In the month of December following, the bankrupt, having entered into a contract for the sale of four of the houses, applied to the testator to give up to him the title deeds relating to them, in order that he might be able to make an effectual conveyance of them to the purchaser; which the testator agreed to do, upon the substitution of another security. The bankrupt accordingly deposited in his hands the title deeds and writings of certain leasehold premises situate at Chiswick and Turnham Green, upon the understanding that they were to be subject to the same terms and conditions as expressed in the former memorandum; but no fresh memorandum in writing accompanied this last deposit. The only point in the case was, whether the petitioner was to be allowed his costs out of the proceeds of the sale of the property at Chiswick and Turnham Green; as there was no express memorandum of the deposit of the title deeds relating to that property.

Where the leases of several houses were deposited, accompanied with a written memorandum, to secure a debt, and the creditor, eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other leasehold property as a substituted security, but without any fresh memorandum in writing; *Held*, nevertheless, that the creditor was entitled to his costs.

*Mr. Anderdon* appeared in support of the petition.

*Mr. Hindmarch, contra*, cited *Ex parte Pigeon (a)*,

(a) 2 Deac. & C. 118.

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where, after a deposit of title deeds, accompanied with a memorandum in writing, to secure a debt which was subsequently discharged, it was verbally agreed between the parties, on the contracting of a fresh debt, that the deeds should stand as a security for the last-mentioned debt; and the Court held, that as the extension of the security was unaccompanied with a written memorandum, the equitable mortgagee was not entitled to his costs out of the produce of the sale.

The Court, however, decided that it was reasonable in this case that the petitioner should have his costs.

Ex parte JAMES JULIUS STOCKEN.—In the matter of  
OLIVER THOMAS JOSEPH STOCKEN.

Serjeants' Inn  
Hall,

March 16, 1839.

The Court refused to stay the bankrupt's certificate,—where no misconduct was charged against him, subsequent to the fiat,—because the amount of the petitioner's debt could not be ascertained until the result of an inquiry, which had been directed before the Master by an order of the Court of Chancery, in a pending suit brought by the petitioner against the bankrupt; notwithstanding the bankrupt was charged with misconduct previous to the bankruptcy, in causing unnecessary delay to the progress of the suit, and the taking the accounts before the Master.

**THIS** was the petition of a creditor, praying, among other things, that certain property of the bankrupt might be sold for the benefit of the petitioner, and that the bankrupt's certificate might be stayed. The following were the facts, as stated in the petition.

*John and William Stocken* being in partnership as brewers, and being jointly entitled to the brewery and certain copyhold and leasehold lands and hereditaments at Walham Green, *John Stocken*, by his will dated the 6th July 1818, devised his undivided moiety in these

The word "witness," prefixed to the name of the solicitor attesting the signature of the party presenting a petition, amounts to a sufficient attestation, within the meaning of the general order.

Where a certificate is actually lying in the office for allowance, it is unnecessary to allege in a petition to stay it, that it has been signed by the creditors or commissioners.

premises to his brother, *William Stocken*, and two other trustees, in trust for the maintenance and education of his son and daughter, the petitioner and *Maria Stocken*, during their minority, and when the youngest should attain twenty-one, then to be divided between them in equal shares. And the testator directed, that his share in the brewery and stock should be valued; that the same, together with his share in the copyhold premises, should be offered for sale to his brother, *William Stocken*; and that the monies arising therefrom, and also from the testator's share in the debts due to the partnership, should fall into the residue of his personal estate; but, if *William Stocken* declined to purchase the testator's share in the brewery, then he directed that it should continue, and the business be carried on for the better support of his children. And he bequeathed all the residue of his estate and effects to his son and daughter, on their respectively attaining the age of twenty-one, the interest thereof in the meantime being applied for their maintenance.

*John Stocken* died on the 31st May 1820, leaving the petitioner and *Maria Stocken* surviving him.

*William Stocken* died on the 23rd May 1824, having previously by his will devised his copyhold messuage, brewhouse and premises, together with the brewery business and all book debts, to his son, the above-named bankrupt, whom he appointed one of his executors.

In January 1827, the petitioner, being then an infant, filed by his next friend a bill in Chancery against the executors of *William Stocken* and other parties, stating, that on the death of *John Stocken*, *William Stocken* and the other executors of *John Stocken* entered into pos-

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session of the brewery and the stock in trade, and carried on the business, which was a very profitable concern, until *William Stocken's* death, and that *William Stocken* was at his death greatly indebted to *John Stocken's* estate; and that on *William Stocken's* death, the bankrupt and the other executors obtained possession of the brewery, and had made great profits by carrying on the business; and the bill prayed an account of the respective estates of *John Stocken* and *William Stocken*, and that the brewery and goodwill of the business might be sold, and one moiety thereof secured for the estate of *John Stocken*. The defendants having put in their answer, the cause came on for hearing before the Master of the Rolls, when it was referred to the Master to take an account pursuant to the prayer of the bill; but the Master had not yet made his report. The petitioner, however, alleged, that in taking the accounts before the Master, there was found due from the estate of *William Stocken* to the estate of *John Stocken* the sum of 3825*l.* 1*s.* 9*d.* for a moiety of the profits of the brewery received by *William Stocken* in his lifetime, for the balance received by him in respect of *John Stocken's* personal estate, and for rents received by him of the property of *John Stocken*; that since *William Stocken's* death there was due from the bankrupt to the estate of *John Stocken* 5157*l.* 5*s.* 5*d.*, in respect of a moiety of profits received by the bankrupt from *William Stocken's* death to the 7th March 1835; and another sum of 1652*l.* 9*s.* 7*d.*, for a moiety of the profits received by the bankrupt from that day to the 10th July 1838, and also 595*l.* 10*s.* 10*d.*, for rents received by him of *John Stocken's* real estates.

On the 13th June the bankrupt gave the petitioner

notice that he would discontinue to carry on the business of the brewery ; in consequence of which the petitioner presented a petition to the Master of the Rolls for a sale of the brewery, when the usual reference to the Master was directed for that purpose, by an order dated the 12th July 1838. On the 14th July, 1838, the petitioner and Mr. and Mrs. *Mattam* (the latter being the sister of the petitioner), contracted to sell to the bankrupt a moiety of the brewery for 2500*l.*, and a moiety of the outstanding debts for 1694*l.* 11*s.* 9*d.*; after which the Master duly made his report, approving of such contract ; and the bankrupt obtained an order for payment of the purchase-money into Court, but the same had not been paid by him.

On the 21st November 1838, the fiat issued ; and the petitioner, on the 11th January, filed a supplemental bill against the assignees, for the purpose of having the accounts completed, and bringing the suit in Chancery to a conclusion.

The petitioner claimed a moiety of the brewery, as belonging to the estate of his late father ; and to have a lien on the other moiety, for the amount due by *W. Stocken* (at the time of his death) to the estate of *John Stocken*, and also for the amount due by the bankrupt, upon the accounts of profits of the brewery directed by the said decree ; and the petitioner further claimed to prove for such balance as should be found due from the bankrupt, in respect of the accounts directed by the decree, and also for 595*l.* 10*s.* 10*d.* due by the bankrupt for rents received by him,

On the 25th January last, the Commissioner permitted a claim to be put on the proceedings, on behalf of the petitioner, for the sum of 100*l.*, without prejudice, and di-

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rected notice of any application by the bankrupt for his certificate to be given to the petitioner.

The petitioner charged the bankrupt with having occasioned great delay in taking the accounts, and in the progress of the suit in Chancery; and that it was not till July 1831, that all the items in the bankrupt's discharges were gone through; and that the bankrupt appealed against parts of the decree to the Lord Chancellor, but that the decree was affirmed with costs. The petitioner alleged, that all that remained to be done in the Master's Office might be accomplished in the course of one month, if the bankrupt and his assignees would co-operate with the petitioner for that purpose. The petitioner then stated, that the same solicitor was concerned for the bankrupt, for the petitioning creditor, and for the assignees, and was also concerned for one of the assignees in an action at law, brought by him against the petitioner for an alleged debt, which he claimed to be due from the petitioner, jointly with the bankrupt, for malt furnished to the bankrupt; but in respect of which the petitioner disputed his liability.

The petitioner stated his apprehension, that if the bankrupt obtained his certificate before the Master made his report, the same system of delay and expense would be practised by the bankrupt, and that it was therefore important, that his certificate should be stayed. The petitioner stated, that the suit was not prosecuted against the bankrupt in order to throw any personal responsibility upon him, but that the amount due from his estate to the estate of the petitioner's deceased father, might be the more easily ascertained; that the whole of the debts proved under the fiat amounted only to 104*2*l. 1*9*s. 5*d*.; and that the debt already ascertained to be due from the



bankrupt, in the proceedings in the Master's Office, amounted to more than all the debts proved under the fiat. The petitioner, on behalf of himself and the other parties interested, claimed a lien on the property comprised in the contract of sale of the 14th July 1838, for the amount of the purchase-money.

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The prayer was, that the brewery and stock in trade, and debts, or at least a moiety thereof, might be sold, and the proceeds applied in paying the sum of 4194*l.* 11*s.* 9*d.* to the petitioners, and that the surplus, if any, should be paid in to the credit of the cause; but if the proceeds should be insufficient, then that the petitioner might be admitted to prove for the deficiency; that the allowance of the bankrupt's certificate might be stayed in the meantime, until the Master should have made his report in the suit, and until the debt which might be found due from the bankrupt to the estate of *John Stocken*, or so much thereof as should not be satisfied out of the proceeds of the sale of the brewery, should be proved under the fiat; and that in the meantime the assignees might be restrained from making any dividend, without retaining in their hands sufficient to pay a rateable dividend on such proof.

*Mr. Swanston*, and *Mr. J. Russell*, appeared in support of the petition.

*Sir Frederick Pollock*, and *Mr. Bethell*, on behalf of the respondents, took a preliminary objection to the attestation of the petition. The word "witness," merely, was prefixed to the signature of the solicitor; which was informal, and insufficient to attest the validity of the petitioner's subscription. By the general order of the

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12th August 1809 (a), the signature of each person signing as a petitioner, must be attested by the solicitor actually presenting the petition, or by some person who shall state himself in his attestation to be attorney, solicitor, or agent, of the party signing, in the matter of the petition. In *Ex parte Cracklow* (b) a similar attestation was held insufficient, on the ground that it was not an attestation to the name of the petitioner, but to the petition itself. And it was observed in that case, that it was doubtful whether the attestation was of the signature of the petitioner, or of the Lord Chancellor. Greater strictness is required on a petition to stay a certificate, than on a petition to allow the certificate. This distinction was drawn by Sir George Rose in *Ex parte Tanner* (c). An attestation of the signature of a party to a petition to stay the certificate should be as strict, as the attestation of the execution of a power.

Mr. *Anderdon*, and Mr. *Wood*, supported the objection, on the part of the assignees.

Mr. *Swanston*, and Mr. *J. Russell*, *contrà*. In *Ex parte Cracklow*, the attestation of the petition was more equivocal, than in the present case. The terms of the general order have, in this instance, been substantially complied with. There is no question, that if this petition did not pray to stay the certificate, the attestation might be amended *instantly*. But even the execution of a power has been held to be sufficiently attested, by the word "witness" being prefixed to the signature of the

(a) See 2 Deac. B. L. 98.

(b) Mont. 353.

(c) 2 Deac. &amp; C. 563.

party, who attested the execution of the power; *Doe* d. *Spilsbury* v. *Burdett* (a).

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Sir *F. Pollock*, in reply. That case might, until lately, have been cited as an authority; but the decision was a fortnight ago reversed, on appeal to the Exchequer Chamber. The case might possibly be on its way to the House of Lords; but the decision of the Court of King's Bench was solemnly upset; and it must, at least at present, be taken as the law of the land, that an attestation of the execution of a power must contain a reference to the matter attested—such having been the opinion of a majority of the Judges in the Exchequer Chamber. Therefore, where the signature to an instrument, as in the present case, is required by an order of the Lord Chancellor to be attested, the attestation must specifically state what it is that is attested. Now, what does the party here attest? The word “witness” merely authenticates the act, and not the signature of the party to the act, as in the old law relating to the attestation of a will. But the Lord Chancellor's order expressly requires, that the *signature* of each petitioner shall be attested by the solicitor presenting the petition. If, indeed, a man could not write, and acknowledged a promissory note as his own, and desired another to do it, then the word “witness” would be sufficient; for it would authenticate the instrument as the note of the party who acknowledged it to be his. But here it is not the instrument, but the *signature* that must be attested. In *Ex parte Cox* (b), where there were two petitioners, and the attestation was “Witness to the signature, *J. Mortlock*, solicitor,” the attestation was held in every way insufficient; as it did not even state the witness to be soli-

(a) 4 Adol. & E. 1.

(b) 1 G. & J. 355, note.

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citor to the petitioners, nor specify whether he was witness to the signature of both, or of which of the two petitioners. There are several other cases also, as *Ex parte Wilkinson* (a), and *Ex parte Clapham* (b), which show that the general order of Lord Eldon is to be construed strictly.

Sir JOHN CROSS.—The objection to the form of the attestation is, that it is not in strict compliance with the terms of the general order. The petition is attested, in fact; and it is not suggested, that any possible disadvantage to any party can arise from this form of attestation. The general order referred to is a rule of the Court for its own convenience, and is not the law of the land. If, indeed, an act of parliament were to direct the attestation of an instrument to be in a particular form, that form must then be strictly pursued; as it would be required by the law of the land. Thus, the attestation of a warrant of attorney, given by a party in custody, must be in the same way throughout the kingdom. There is a rule in the Courts of Common Law, that the signature of a counsel must be subscribed to a special plea; that is a rule of convenience, and might be dispensed with, if the Court thought proper. A signature to a promissory note is sufficiently attested by the word "witness;" so in the attestation of the signature to an agreement, that word has been held sufficient. I cannot bring my mind to say, that in the case of *Ex parte Cracklow* (c) there was any cause for doubt, whether the attestation there related to the signature of the Lord Chancellor, or the petitioner. Then it has been said, that there is

(a) 1 G. &amp; J. 363.

(b) Mont. &amp; M'A. 51.

(c) Mont. 353.

a distinction, in construing the rule, between a petition to stay the certificate, and a petition to have it allowed; and that in the former case it must be construed with greater strictness. But why is there a difference in that respect? If an attestation is bad in one case, it is bad in all cases. I observe, that the witness has signed the word "slor.," instead of "solicitor," to the attestation, which appears to me quite as forcible an objection to its validity, as the one that has been relied on by the counsel for the respondents; as the terms of the general order require the witness to state himself to be attorney, *solicitor*, or agent for the party signing.

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Sir GEORGE ROSE concurred.

Sir *Frederick Pollock* then urged another preliminary objection, namely, that it did not appear from any statement in the petition, in what state the certificate was. The petition merely asked, that the certificate might be stayed, without containing any allegation that any such document had been signed by the proper number of creditors, or had been allowed by the Commissioners. The petition does not in fact state, that the certificate has been obtained by the bankrupt; which is a necessary allegation, and cannot be afterwards supplied. For, according to what is said by the Vice Chancellor in *Ex parte Cundall*, "in a petition to stay a certificate, all material facts must be equally stated in the petition, and in the affidavit which accompanies it, so as to make a *prima facie* case for staying the certificate. [Sir *John Cross*. Here the certificate is in Court, a fact of which the Court cannot help taking cognizance.] Still, in various cases which concern the liberty of the subject,

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a matter must be stated on the record, notwithstanding the Court may know it of their own knowledge. As certain acts, therefore, are not only required to be done, but must be alleged to have been done, before a party can petition to stay the certificate, it follows, that, in the absence of the latter allegation, the petition is defective; and the case of *Ex parte Groome* (a) shows, that a petition to stay a certificate, prospectively, cannot be supported. The same principle applies to various proceedings in the Courts of Common Law. On an application to set aside an award, for instance, the affidavit, in support of the application, must state, that the award, or the submission, has been made a rule of Court; and it is fatal to the application, if it omits to do so. The Court might look at their own rules, if they chose, to ascertain the fact; but that is not the practice.

Sir GEORGE ROSE.—If the certificate had not been, at the time when the petition was presented, actually lying in the office, the petition might, in that case, have been considered a premature application; but, as such was really the fact, I do not think the absence of the allegation of it is very material.

Sir JOHN CROSS, also, concurred in opinion against the validity of this objection.

Mr. *Swanston*, and Mr. *J. Russell*, then proceeded on the merits. The question, as to the rights of this petitioner, arises under the will of *John Stocken*, the father of the petitioner; by which he devises his property, upon certain trusts, for the benefit of his son and daughter,

(a) Buck. 39.

the petitioner, and Mrs. *Mattam*, the wife of *Peter Mattam*. The petitioner, in this case, has the same rights, as an unpaid vendor possesses, to come in and establish his claim against the bankrupt. And that part of the prayer of the petition;—which prays that the surplus of the proceeds of the sale of the brewery, after payment of the sum of 4194*l.* to the petitioner, may be paid in to the credit of the cause still pending in the Court of Chancery,—is supported by the decision of this Court in *Ex parte Farden* (a), where a sum having been ordered to be paid into Court by the bankrupt, in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for that amount; and the assignees were directed to reserve dividends on that sum, to be paid to the Accountant General, to the credit of the suit in Chancery. And the case of *Ex parte Hancock* (b) is to the same effect. [Sir George Rose. There is a distinction between a case, as in *Ex parte Hancock*, where the accounts are taken in bankruptcy, and a case where the accounts have been taken in a suit.] The principle of the cases is, that, although the creditor cannot prove immediately, because certain accounts between him and the bankrupt are to be taken, he is not to be deprived of his right, to assent to, or dissent from, the certificate. There does not appear to be any sound reason for a distinction between a case, where the accounts are to be taken in a suit, and one where they are to be taken before the Commissioners. The only objection to staying the certificate, where the amount of the debt of the creditor is to be ascertained by an account to be taken, is, that there has been an im-

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(a) 3 Deac. & C. 479.

(b) 3 Deac. & C. 523.

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proper delay on the part of the creditor (a). That cannot be imputed to this petitioner. In cases of this kind, the Court does not require any misconduct of the bankrupt to be proved, to induce them to stay the certificate; it is enough, that a creditor has been prevented from proving his debt, and has had no opportunity of assenting to, or dissenting from, the allowance of it. The case of *Ex parte Whitchurch* (b) shows, that where the probable amount of the balance of a creditor's debt is disputed, although the Court may not make an order for staying the certificate, they will direct it to be deposited in the Bankrupt Office, subject to further order. The whole of the debts proved under the fiat is only 1402*l.*; while the demand of the petitioner is three times this amount. Under these circumstances, why should the certificate go, at the earliest possible moment at which it can be allowed? The particular tribunal, before which the account is to be taken in this case, cannot affect the principle by which the Court is guided, in the exercise of its discretion in all cases of this description; and that is, to give the creditors every reasonable protection.

Sir *Frederick Pollock*, and Mr. *Bethell*, *contra*, were stopped by the Court.

Sir JOHN CROSS.—The legislature has left the final allowance of the bankrupt's certificate, as a matter entirely for the discretion of the Court; and, if the present had been the first application of the kind, I, for one, should have been inclined to suspend the allowance of it. But this discretion has been long subject to cer-

(a) See *Ex parte Hadley*, 1 G. & J. 193.

(b) 1 G. & J. 71.



tain rules ; and, without going into all the cases on the subject, it is sufficient to say, that the exercise of that discretion is, under the circumstances of the present case, restrained by the decisions on previous occasions. The certificate, therefore, must be allowed.

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Sir GEORGE ROSE.—The proceedings in the suit in Chancery, consequent on the matter in dispute, were long anterior to the issue of the fiat ; and unless any misconduct can be attached to a bankrupt during the period of his bankruptcy, the Court cannot interfere, for the purpose of stopping his certificate. In what mode has the Court ever so interfered, except for positive misconduct during the bankruptcy ? It is, therefore, unnecessary to inquire, whether, or not, the bankrupt had interposed difficulties in the way of effecting a final settlement of accounts with the petitioner, previous to his bankruptcy. There never was a case so little tenable, as that which appears on the face of this petition, to justify the Court in staying the certificate. That part of the petition, therefore, which relates to the stay of the certificate, must be dismissed with costs. As to the other points, the petitioner is entitled to have his claim admitted to proof, for such amount as the Commissioner, on inquiry, shall think fit. The assignees ought to be restrained from distributing the property until the amount of the petitioner's claim shall be finally adjusted ; and the remaining costs must be costs in the cause.

Mr. *Anderdon*, and Mr. *Wood*, on behalf of the assignees, urged that the petition should be dismissed al-

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together, with costs. The 59th section of the Bankrupt Act is against this partial relief. By that section it is declared, that no creditor, who has brought any action or suit against the bankrupt, in respect of a demand which might have been proved as a debt under the commission, shall prove a debt, or have any claim entered upon the proceedings, without relinquishing such action or suit. The petitioner, therefore, ought to abandon his suit in equity; or, at any rate, the Court should order him to relinquish such suit, and transfer it to this Court.

The COURT, however, declined to alter the order already pronounced.

The ORDER was, that the petition, as against the bankrupt, should be wholly dismissed with costs, and that the bankrupt's certificate be laid before the Court for confirmation and allowance; that so much of the petition as related to the certificate, as against the assignees, should be also dismissed, with costs; that the assignees should be restrained from making or paying any dividend, until the debts due from the bankrupt to the petitioner should be proved, or until further order; and that the remaining costs of all parties should be costs in the pending suit in Chancery of *Stocken v. Dawson*.

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Ex parte JOHN PHEASANT and another.—In the matter  
of FREDERICK SHERWOOD.

*Serjeants' Inn  
Hall, March 16,  
1839.*

**THIS** was also a petition of creditors, to stay the allowance of the bankrupt's certificate, until they should be able to go in and prove the balance of their debt under the fiat.

The Court will not stay the bankrupt's certificate, until the determination of an action brought by the petitioner against a third party, for the purpose of realizing a portion of his debt ; where the petitioner did not appear to have used due diligence in proving the remainder of his debt.

It appeared, that the petitioners held, as securities for their debt, an assignment of a debt due to the bankrupt from the London Dock Company, and a mortgage of the bankrupt's equity of redemption in certain leasehold premises at Lambeth ; and that by an order of the Court made on a former petition of the present petitioners, it was ordered, that the assignees should concur with the petitioners in all acts necessary to be done by them for obtaining payment of the debt due from the London Dock Company, to the extent of the security held by the petitioners. The petitioners stated, that they intended to prosecute that order with due diligence ; that they had already commenced an action against the London Dock Company for recovery of the debt due to the bankrupt ; the amount of which being disputed by the Company, a negotiation had been opened with them for ascertaining the amount of the debt, without proceeding with the action. The fiat issued on the 8th August 1838 ; and the petitioners accounted for the delay in proving their debt, by stating, that proposals had been made by the bankrupt and some of his principal creditors, to induce the petitioners to take upon themselves the payment of a composition on the bankrupt's debts, upon having an assignment executed to them of all the bankrupt's estate and effects, which were not comprised in the

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securities held by the petitioners; and that the treaty for effecting this arrangement, which had been some time pending, was only broken off shortly before the petitioners presented their former petition. The petitioners alleged, that the debt due to them from the bankrupt amounted to 3640*l.* 3*s.* 8*d.*, exclusive of interest, and that the securities which they held for the same would not realize more than 1600*l.* at the utmost; thereby leaving a sum of 2040*l.* 3*s.* 8*d.*, at the least, to be proved by the petitioners; of which the sum of 1000*l.* would be sufficient to turn the certificate.

Mr. *Swanston*, and Mr. *Keene*, in support of the petition. The only object of the petitioners is to stay the certificate, until, by the realization of the securities held by them, the amount could be ascertained, for which they were entitled to prove under the fiat. It has been decided in *Ex parte Whitchurch* (a), that a mortgagee may petition to stay a certificate until his security is realized; and in *Ex parte Hadley* (b), also, the bankrupt's certificate was stayed, upon the petition of the partner of the bankrupt, until the partnership accounts should be taken; no want of due diligence being imputable to the petitioner. In the present case, the petitioners are proceeding in an action against the London Dock Company, to recover the amount of the debt due to the bankrupt, and are using all due diligence to realize their security. The defence of the bankrupt is, that the assignment of the debt due from the London Dock Company was executed by him to the petitioners, after he had committed an act of bankruptcy, and that the petitioners were aware of the fact; but the account he gives of the

(a) 1 G. &amp; J. 71.

(b) 1 G. &amp; J. 393.

matter is so improbable a story, that the Court will hardly give credit to it. His statement is, that one of the petitioners, before the bankrupt executed the assignment, asked him if he had committed an act of bankruptcy; and that the bankrupt said, he had not, unless a denial to a creditor the previous day amounted to an act of bankruptcy; and that the bankrupt thereupon specified the circumstances of the denial. After this communication, the bankrupt would have the Court believe, that the petitioners consented to take the assignment as a security for future credit and advances. The only answer to such a statement is, that the petitioners would have been perfectly insane, to have acted in the manner represented by the bankrupt; and they deny the truth of this statement. But whether the security held by them is good, or not, the amount of their debt, either with, or without, their security, is quite sufficient to turn the certificate. And Lord *Eldon* in one case stayed the certificate, in order that a creditor who resided abroad, and whose debt would turn the certificate, might have an opportunity of assenting or dissenting to its allowance; *Ex parte Lord (a)*.

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Sir JOHN CROSS.—In this case, it has been stated that the petitioners have been prevented from proving their debt by unavoidable delay. But I see nothing in the petition, or the affidavits, to warrant this allegation. The petitioners state, that they are proceeding in an action against the London Dock Company, for the purpose of realizing a portion of their debt; and that the exact balance due to them from the bankrupt cannot be ascer-

(a) 2 Rose, 421.

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tained, until that action is determined. But it would be unreasonable, to prevent the bankrupt from having his certificate, until the determination of this suit; for that would be to deprive the bankrupt of all benefit from his certificate, for an uncertain, and perhaps for a long, period of time, when no misconduct has been alleged against him to justify the Court in withholding it.

Sir GEORGE ROSE.—The petitioner was in a perfect condition to have come to this Court sooner than he has done, for the purpose of making his security available. The petition must therefore be dismissed, with costs.

Petition dismissed, with costs.

*Serjeants' Inn  
Hall, March 20,  
21, 27, 1839.*

The petitioning creditor issued a fiat on the 20th December 1837, but forbore to prosecute it, to enable the bankrupt, who had some disputes pending with his partner, to settle them by arbitration. The award was not made till the 14th February 1839, when the petitioning creditor applied for leave to issue another fiat; but the application was refused both by the Court of Review, and the Lord Chancellor.

Ex parte FRANCIS THORNLEY FOLJAMBE and others.—  
In the matter of JOHN HEWITT.

THIS was an application, that the same petitioning creditors might be at liberty to sue out a second fiat against the bankrupt, the time having long expired for prosecuting the first. It appeared, that the bankrupt had carried on business in partnership with his brother, *Robert Lightfoot Hewitt*, and that they had become indebted to the petitioning creditors in a large sum of money, who applied to them for payment; when *Robert Lightfoot Hewitt* stated that his brother was indebted to him in a large amount, and that disputes having arisen between them, they were prevented from liquidating the debt due to the petitioners. The petitioners, having afterwards received information that *John Hewitt*

had committed an act of bankruptcy, issued a fiat against him on the 20th December 1837 ; but, a few days afterwards, having been informed that the two brothers had agreed to refer all matters in dispute to arbitration, the petitioners, in the hope that these disputes would be soon adjusted, and the debt due to the petitioners discharged, forbore to prosecute the fiat, until the arbitrators had made their award. This event, however, did not take place before the 14th February last, when the arbitrators awarded the sum of 3121*l.* to be paid by instalments by *John Hewitt* to *R. L. Hewitt*. The petitioners stated, that in consequence of receiving information that *John Hewitt* had not complied with the award, but that on a copy of it being left at his lodgings, he had thrown it into the street, they were led to think that their expectation of the payment of their debt would not be realized ; and they were therefore desirous of issuing another fiat.

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FOLJAMBE.

Mr. *F. Bayley*, in support of the petition, said that the present case was the very reverse of the case of *Ex parte Masterman* (a), where a petitioning creditor was refused permission to take out another commission, after the time had elapsed for proceeding with the first. In that case, the reason assigned by the petitioning creditor for his delay was, having entered into an agreement of composition with the bankrupt ; and it was only because the bankrupt failed in paying some of the instalments under the composition, that the creditor applied to strike a docket for another commission. Under these circumstances, Lord *Eldon* refused leave to the petitioning creditor to issue another commission, saying, “ I do

(a) 18 Ves. 298 ; 2 Rose, 442.

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not approve of this use of a commission of bankruptcy, to grind an unfortunate man, and will give no assistance to such a purpose." But, in the present case, the delay arose from motives of kindness and consideration of the petitioning creditor for his debtors, and not at all with the view of obtaining any advantage to the creditor. There was here no agreement for a composition, nor any understanding or negotiation with the bankrupt to serve the ends of the petitioning creditor; but a mere voluntary forbearance on his part to prosecute the fiat, until the disputes between the bankrupt and his partner were adjusted by the arbitration.

*Sir George Rose.*—Whatever was the motive of the petitioning creditor for delaying to proceed with the fiat, his conduct has produced a state of circumstances extremely inconvenient and injurious to the other creditors of the bankrupt, inasmuch as the issuing of the fiat was notice to all the world of an act of bankruptcy; and the effect would be, to invalidate all dealings with the bankrupt subsequent to that time.

*Mr. Bayley.*—The issuing of the fiat would not be notice in this case of an act of bankruptcy, as there was no adjudication; the 6 *Geo. 4. c. 16. s. 83.*, expressly declaring, that the issuing of a commission shall only be deemed notice of a prior act of bankruptcy, "if the adjudication of the person or persons, against whom such commission has issued, shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same."



The COURT said, that they did not think there were sufficient grounds alleged to induce them to grant the application.

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Mr. *Bayley* renewed his application this day before the Lord Chancellor, distinguishing the present case from that of *Ex parte Masterman (a)*, before cited, and *Ex parte Smith (b)*, where the commission was issued for the purpose of pressing the bankrupt and his friends to an arrangement.

Lincoln's Inn  
Hall,  
March 21.

Lord *Cottenham*, C. desired that the affidavit of the petitioning creditor might be handed up to him, and he would read it, and dispose of the case on a future day.

His *Lordship* this day said, that the reason assigned by the bankrupt's brother for non-payment of the debt, namely, that the bankrupt was the person who ought to pay it, was the very reason why the petitioning creditor should have proceeded with the fiat; and he therefore refused the application.

March 27.

(a) 18 Ves. 298; 2 Rose, 442.

(b) Rose, 332.

Ex parte MINERVA GOODMAN.—In the matter of JOHN HENRY NAINBY.

Westminster,  
April 18, 1839.

THIS was the petition of the executrix of a judgment creditor for liberty to prove, under the following circumstances.

A creditor having, before the bankruptcy of his debtor, taken him in execution, died shortly before the issuing of the fiat; and the

bankrupt, eight months after the issuing of the fiat, obtained a judge's order for his discharge, on the ground that the action abated by the death of the plaintiff; the plaintiff's executrix interfering in no way whatever to oppose the discharge:—*Held*, that the discharge was not an extinguishment of the debt, and that the executrix could prove the amount of it under the fiat.

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In Michaelmas term, 1830, the bankrupt, being then a prisoner for debt in the Queen's Bench, was charged in execution by the creditor for the sum of 73*l.* 10*s.*, and continued in prison until the issuing of the fiat, which was sued out on the 6th October 1837. The creditor died shortly before the fiat was issued; and, in June 1838, the bankrupt served the petitioner with a summons to shew cause before the Lord Chief Justice of the Court of Queen's Bench, why the bankrupt should not be discharged out of custody, the action having abated by the death of the plaintiff, and the judgment not having been revived. No cause being shewn on the return of the summons, an order was made by Lord Denman, on the 13th June 1838, for the bankrupt's discharge. The petitioner alleged, that she was always disirous of proving the debt, and applied to prove it, as soon as she was informed that a dividend would be paid; but the commissioner thought, that after the bankrupt had been taken in execution, and subsequently discharged from custody, the debt could not be proved.

Mr. *Bethell* appeared in support of the petition.

Mr. *Steere*, for the assignees, contended, that the discharge of the bankrupt was a voluntary act on the part of the petitioner; inasmuch as after being served with the summons, she did not attend to show cause before the Chief Justice, but let the order for the discharge be made without any opposition.

Mr. *Rogers*, and Mr. *Petersdorff*, appeared on behalf of the Bankrupt. [Mr. *Bethell* objected to their being

heard for the bankrupt, against a petition to prove a debt; but the Court permitted them to cite any cases that bore upon the question.] In *Cohen v. Cunningham* (a), it was decided that a judgment creditor, who had taken his debtor in execution, could not sue out a commission of bankruptcy against him upon the same debt. And in *Burnaby's* case (b), upon the authority of which the doctrine in *Cohen v. Cunningham* was founded, the same point was also expressly decided. So, in *Taylor v. Waters* (c), it was held, that *B.* could not, in an action brought against him by *A.*, set off a judgment recovered by him against *A.*, for which *A.* was charged in execution. In *Blackburn v. Stupart* (d), the Court held, that a defendant could not be taken in execution twice on the same judgment, although he was discharged the first time by the plaintiff's consent, upon an express understanding that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. And the same principle had been previously acted upon in *Vigers v. Aldrich* (e); where a plaintiff having taken the defendant in execution, and discharged him on an agreement to pay the debt at certain stipulated times, it was held, that he could not afterwards bring an action upon the judgment. It appears in the present case, that the Lord Chief Justice discharged the bankrupt out of custody, because there had been no revival of the judgment since the death of the plaintiff; but in *Tidd's Practice* it is laid down, that an executor need not revive a writ of *capias ad satisfaciendum* by *scire facias*.

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Ex parte  
GOODMAN.

(a) 8 T. R. 123.

(b) 1 Str. 653.

(c) 5 M. &amp; S. 103.

(d) 2 East, 243.

(e) 4 Burr. 2482.

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GOODMAN.

Mr. *Bethell* was not heard in reply.

Sir JOHN CROSS.—There is no doubt, that at the time of the death of the creditor, the debt due to him from the bankrupt was still in existence. The moment, however, that the plaintiff in the action died, the bankrupt was as much entitled to his discharge, as when he got it, provided the executrix of the plaintiff did not interfere. In *Broughton v. Martin (a)*, the Court of Common Pleas discharged a defendant out of custody, who was in execution at the suit of a plaintiff, some time since deceased, where there was no executor or administrator of the plaintiff, and the plaintiff's family, on notice of a motion for the discharge of the defendant, declined interfering. If the bankrupt chose to lie in prison so long before he applied for his discharge, he has sustained no prejudice at the hands of the petitioner; more especially as no steps were taken by the petitioner to oppose his discharge, when he did apply for it. But, cannot a plaintiff, who has his debtor in execution, discharge him from custody in case of his bankruptcy, and prove his debt under the fiat? It is different, where the creditor takes the bankrupt in execution after the issuing of the fiat; for that amounts to an election; *Ex parte Knowell (b)*. The question is here, whether, when the Chief

(a) 1 Bos. & P. 176. And see *Parkinson v. Horlock*, 2 N. R. 240; but see *Holmes v. Murcott*, 1 Bing. 431.

(b) 13 Ves. 192. In this case Lord *Erskine* is reported to say, "Considering the bankruptcy out of the case, it is clear, that by taking the body in execution, the debt is satisfied to all intents and purposes." But the proposition does not quite hold to that extent, if the doctrine of Lord *Ellenborough* on this subject in *Taylor v. Waters* is correct; where he observes, that the taking of the body in execution does not extinguish the debt, but only bars the remedy against the debtor. See 5 M. & S. 104.

Justice ordered the discharge of the bankrupt, the debt thereby became extinguished. I think it did not; and I have no hesitation in saying, that the petitioner, under these circumstances, has a right to go in and prove the debt under the fiat (a).

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Ex parte  
GOODMAN.

Sir GEORGE ROSE.—It appears to me, that there is nothing in the objection, as to the lapse of time since the issuing of the fiat, to prevent the petitioner's right of proof. The taking of the body in execution before the issuing of the fiat is only an extinguishment of the debt *sub modo*.

The ORDER was, that the proof should be admitted, and the costs of all parties paid out of the estate (b).

(a) His Honour referred also to *Baily's* case, 2 Mod. 315, where a debtor being in execution, and the plaintiff dying intestate, the debtor took out administration to the plaintiff, and applied for her discharge, on the ground of having administered to her creditors; but the Court held, that she could not be thus discharged, because *non constat de personâ*, and she could not give a warrant of attorney to acknowledge satisfaction.

(b) See 1 Deac. B. L. 191.

Ex parte THOMAS GAITSKELL, and JOHN GAITSKELL.—

In the matter of THOMAS BENJAMIN KING.

THIS was the petition of certain creditors of the bankrupt, to annul the fiat, under the following circumstances, as stated in the petition :—

Westminster,  
April 22, 1839.

Where a fiat is sued out, for the sole purpose of defeating a judgment creditor, and procuring for the

bankrupt his certificate, the fiat will be annulled, notwithstanding the sufficiency of the usual requisites.

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GAITSKELL.

On the 20th December 1838, a fiat was issued against the bankrupt, on the petition of his father, *Thomas King*.

On the 23rd November 1838, the petitioners had obtained a verdict against the bankrupt, in an undefended action, for goods sold and delivered; upon which judgment was entered up for 299*l.* 6*s.* 3*d.*, and 38*l.* 3*s.* 9*d.* costs.

The bankrupt was a publican, carrying on business in King Street, Leadenhall Street, and on the 22nd November 1838, he entered into an agreement for the sale of the lease of his public-house, and the goodwill of his business, and his stock-in-trade; which sale was completed on the 26th November, and produced a clear sum of 681*l.* 0*s.* 4*d.*

The petitioners stated, that it was usual and customary in the trade, when an establishment of this kind was given up and sold, to give notice to all the trade creditors, and to allow the wine merchant of the concern to receive the value of the stock of wine, and the distiller to take the value of the stock of spirits on the premises, towards satisfaction of their respective demands; but that no notice whatever of the sale was given to the creditors of the bankrupt, except Messrs. *Barclay & Co.*, the brewers, a clerk of whom attended the completion of the sale, and upon the payment of the purchase-money, the sum of 628*l.* 15*s.*, and also 6*l.* 4*s.* 4*d.*, the value of the ale and porter on the premises, were paid to Messrs. *Barclay & Co.*, in satisfaction of a debt due to them; and the bankrupt, out of the residue of the purchase-money, received 47*l.* 14*s.*, which he applied to his own use. The petitioners charged, that the above-mentioned sale was made by the bankrupt in concert with his father, in order to defraud the petitioners, and prevent them from obtaining any benefit from their judgment, and with the further

view of issuing a friendly fiat against the bankrupt ; and that for this purpose, the bankrupt, on the 13th December 1838, inserted in the Gazette a declaration of his insolvency, with the privity of his father. One of the petitioners attended the meeting for the choice of assignees, not for the purpose (as it was alleged) of proving their debt, but merely to watch the proceedings ; and, on the Commissioner being informed that there was no estate to be administered, he expressed his intention to adjourn the choice ; but, being afterwards informed of the sale of the bankrupt's lease and stock-in-trade, he intimated his opinion that there ought to be a choice of assignees, thinking the sale to be fraudulent ; and, at the same time, considered the petitioner, *John Gaitskell*, to be a proper person to be appointed assignee ; upon which he was induced to prove under the fiat, and to consent to be appointed assignee ; but it was distinctly stated, on behalf of the petitioners, that they did not thereby admit the validity of the fiat, but were induced to take that course, in deference to the suggestion of the Commissioner, and with a view to see whether the sale could be successfully impeached, for the benefit of the bankrupt's creditors ; and that such acceptance of the office of assignee was to be without prejudice to the full right of the petitioners to apply to annul the fiat. The petitioners then stated, that they had since, upon inquiry, ascertained that Messrs. *Barclay & Co.* held the lease of the public-house, as a security for 525*l.* advanced to the bankrupt ; and that the estimated value of the lease, upon the above sale, was 450*l.*, to which extent the sale could not be affected ; and the petitioners were advised by their counsel, that it would not be prudent to bring an action against Messrs. *Bar-*

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GATSKELL.

*clay & Co.* for the recovery of the money received by them.

The amount of the debts proved under the fiat was 614*l.*, and the amount of the debts not proved about 300*l.*

The petition alleged, that the accounts of the bankrupt were in a very irregular and imperfect state, and that it nowhere appeared that the bankrupt's father, who sued out the fiat, was a creditor of the bankrupt; that the assets did not exceed 10*l.*; that the fiat was sued out by the petitioning creditor, in fraudulent collusion with the bankrupt; that the bankrupt had stated that he would have taken the benefit of the Insolvent Act, but that he was apprehensive of being remanded, on account of a vexatious defence of the action brought against him by the petitioners.

The petitioning creditor had proved a debt of 102*l.* 10*s.*, upon a bill of exchange drawn by the bankrupt upon his father, and indorsed by *Henry King*, his brother, and alleged to have been accepted as a security for a debt due by the bankrupt to one Mr. *Goldie*.

In answer to the allegations in the petition, *Thomas King* swore, that he was not privy to the sale of the bankrupt's lease and stock, not being aware of it until after it had taken place, when he expressed his disapprobation of it to the bankrupt and other persons; that he never contemplated applying for a fiat against the bankrupt, until after the sale had been made by him, and a preference given to Messrs. *Barclay & Co.*; and that the advertisement of insolvency was not inserted with the privity of *Thomas King*; that being advised that the payment made to *Barclay & Co.* could not, at all events,



be sustained beyond the sum of 450*l.*, the deponent determined to issue a fiat against the bankrupt, with the view of making *Barclay & Co.* refund the money, which, the deponent considered, they had received by way of preference from the bankrupt; that he expected the sum of 184*l.* 19*s.*, at least, would be recoverable under the fiat from *Barclay & Co.*; and that he was not sure the bankrupt was in insolvent circumstances, until he discovered that he had sold his lease and stock.

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Mr. *Anderdon*, in support of the petition. The father of the bankrupt is, in this case, the petitioning creditor; and the petition charges, that the declaration of insolvency, which was the act of bankruptcy, was concerted between the bankrupt and his father; and that the fiat was concocted between them, for the sole purpose of whitewashing the bankrupt. The petitioners, being unable to obtain payment of the debt owing to them by the bankrupt, brought an action against him, and obtained a verdict, but were defeated, in consequence of the sale of the whole of the bankrupt's effects. The sale took place only three days after the verdict; the latter having been obtained on the 23rd November, and the sale taking place on the 26th, and the declaration of insolvency was filed on the 13th December. The question will be, therefore, whether, under the circumstances stated in the petition, this must not be considered as a fraudulent fiat.

Mr. *Bethell*, and Mr. *Tripp*, *contrà*. The affidavits filed in answer to the petition deny any fraudulent collusion between the bankrupt and his father, while the petitioners have made no affidavit to support the charges of fraud stated in the petition. Their affidavit only

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states, that they have "ground to suspect" that the fiat was sued out by the petitioning creditor, in collusion with the bankrupt; but without stating what were the grounds for this suspicion. The petitioner, *John Gaitskell*, got appointed assignee for the very same purpose for which the petitioning creditor issued the fiat, namely, with a view to set aside the sale of the bankrupt's lease and effects, or compel *Barclay & Co.* to refund the proceeds of the sale. It is true, that there are hardly any assets, except what may be got from compelling *Barclay & Co.* to refund the money received by them; but it is not because the assets may be small, or because the attempt to upset the payment to *Barclay & Co.* may be unsuccessful, that the fiat is to be held to have been improperly issued. If there are no assets to pay the expenses of prosecuting the fiat, they will not fall on the petitioners, but on the petitioning creditor. In *Ex parte Bourne* (a),—where Lord Eldon superseded a commission, because it was taken out for the express purpose of putting an end to an action brought by the bankrupt against the petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the general creditors,—Lord Eldon admits, that "where a commission is taken out with a motive of defeating an action, but with the intent and purpose of its operating as a commission, the Court would not interfere to supersede such commission." And where a petition was presented to this Court to annul a fiat, on the bankrupt's suggestion that the object of the petitioning creditor was to dissolve a partnership subsisting between the bankrupt and other persons, the Court said, that in order to induce them to annul the fiat on this ground, they must be quite satisfied,

(a) 2 G. & J. 137.

that the dissolution of the partnership was the *sole* object of the petitioning creditor; *Ex parte Parkes* (a). So, it is not a sufficient ground for annulling the fiat in this case, that the petitioning creditor had a *bye* object in issuing it; his *sole* object must have been improper. The Commissioner examined into the matter, and acquiesced in the propriety of working the fiat. The *bona fides* of the petitioning creditor was not impeached by any evidence, and his debt was undisputed.

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Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS.—If there was the prospect of any advantage to the general body of the bankrupt's creditors, or to the petitioning creditor himself, in prosecuting this fiat, I should be unwilling to annul it. But it appears to me, that it cannot possibly be worked for any beneficial purpose. The assets amount to only 10*l*., while the amount of the debts proved exceeds 900*l*. It is said, that one of the objects of the fiat was to compel *Barclay & Co.* to refund the money paid to them out of the proceeds of the sale of the bankrupt's lease and effects; but the only ground, on which the transaction with *Barclay & Co.* could be impeached, would be, that the bankrupt deposited his lease with them, in contemplation of bankruptcy; but there is not a shadow of evidence in support of this suggestion. The question is, then, whether the fiat was sued out by the bankrupt's father, for the benefit of himself and other creditors, or in concert with his son, for the exclusive benefit of the latter. The intention of the petitioning creditor must be judged of by the facts. Now, what are those facts?

(a) 3 Deac. 31; and see *Ex parte Willbeam*, Buck, 459.

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Ex parte  
GAITSKELL.

It appears, there had been an action brought by the petitioners against the bankrupt, and a verdict obtained against him, no defence being offered at the trial, and the opposition being clearly vexatious. Three days afterwards a sale of all the bankrupt's property took place, evidently with a view to defeat the judgment obtained by the petitioners; an act of bankruptcy was concocted, and the requisite machinery prepared, the bankrupt's father supplying the place of a petitioning creditor; the bankrupt, his father, and the solicitor, were all together before the Commissioner, and the solicitor proves the filing of the declaration of insolvency, which constituted the act of bankruptcy. The bankrupt was liable, under the judgment obtained against him by the petitioners, to have his person seized; and this was prevented by his father suing out a fiat, under which he could obtain a protection from the Commissioner. This has been the whole result of the fiat; and the question is, therefore, whether the fiat was sued out for a proper purpose, or for the sole purpose of benefiting the bankrupt. I am of opinion, that it is the fiat of the bankrupt, and of no other person, and consequently that it ought to be annulled.

Sir GEORGE ROSE.—I concur with my learned colleague. The money paid by the bankrupt to *Barclay & Co.* could not for a moment be considered in the light of a fraudulent preference; for the sale of the bankrupt's lease and goods, and the payment to them of the proceeds of the sale, were by virtue of the previous security they held, and which was delivered to them by the bankrupt long before the sale took place. It is quite obvious, that this fiat is taken out for no earthly object but to give the bankrupt his certificate, and to deprive the petitioners

of the fruits of their judgment. There has been an abuse of the process of the Court; the fiat must, therefore, be annulled, notwithstanding the sufficiency of the usual requisites.

Fiat annulled, with costs.

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GAITSKELL.

In the matter of WILLIAM NORRIS, and THOMAS NORRIS.

Westminster,  
April 26, 1839.

THIS was a contest between two creditors for the fiat. It appeared, that after a joint fiat had issued against the two bankrupts, *Thomas Norris* died on the 22d April; and that on the 24th April, the same petitioning creditor applied at the Bankrupt Office, with fresh docket papers, for a separate fiat against *William Norris*, the survivor, but found that other docket papers for a separate fiat had been previously tendered by another creditor.

After a joint fiat was issued against *A. & B.*, *A* died; upon which the same petitioning creditor, two days after *A.*'s death, applied at the office with fresh docket papers, for a separate fiat against *B.*, but found another creditor had previously lodged other docket papers for such separate fiat:—*Held*, that the petitioning creditor under the joint fiat was, under these circumstances, entitled to the preference.

Mr. *Swanston*, on behalf of the other creditor, now applied for an order to annul the joint fiat, and that a separate fiat might be issued against *W. Norris*, on the docket papers of the other creditor, who was the prior applicant as to the separate fiat. The joint fiat is invalid, by reason of the death of *T. Norris*; and, as our docket papers were the first in the office for the separate fiat, we are entitled to the preference.

Mr. *Bacon*, for the petitioning creditor under the joint fiat, contended, that notwithstanding the death of one of the bankrupts against whom the joint fiat was issued, the petitioning creditor had a right either to go on with that fiat against the survivor, or to issue a fresh one, without the interference of any other creditor.

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and another.

Sir GEORGE ROSE.—All that you want, is a separate fiat against the survivor. The joint fiat already issued is sufficient to estop them from issuing a fresh fiat.

Mr. *Swanston*, in reply. I did not expect to hear it urged, that the joint fiat could be proceeded with, after the death of one of the two parties against whom it was issued. This is not like the case, where, after a joint fiat being issued, the Lord Chancellor supersedes it as to one of the parties, and it remains good as to the other; for this is specially provided for by the 16th section of the 6 *Geo.* 4. c. 16.; but there is no such provision, in case of the death of one of the bankrupts. An adjudication under a joint fiat against *A.* and *B.*, that *A.* only has become bankrupt, will not support the fiat against *A.* In *Ex parte Green* (a), where one of two parties had died after the issuing of a joint commission against them, Sir *G. Rose* said, that the commission was void by the death of one, and that it might be superseded, as a matter of course, by application at the Bankrupt Office. But this the Bankrupt Office would not do in the present case, and we have been obliged to come here for an order to annul the joint fiat. There is nothing contained in the 16th section of the Bankrupt Act, which enables this Court to give effect to an invalid fiat; for, where a joint fiat is void as to one of the parties named in it, it ought not to be partially, but wholly, superseded; *Ex parte Wray* (b). Sir *John Leach* mistook the meaning of the 16th section, when he decided that a joint commission, invalid in its concoction, might be superseded as to one of the bankrupts, and be good as to the other. For that section only intended, that a

(a) 1 Deac. 249.

(b) Mont. &amp; M. 195.

commission originally valid should not be rendered invalid, by superseding it as to one of the parties; not that an invalid commission should be made valid, by a partial supersedeas.

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Ex parte  
NORRIS  
and another.

Sir JOHN CROSS.—Without giving any opinion as to the invalidity of the joint fiat, it seems to be admitted by both parties, that there ought to be a new one. It appears to me, that the first party who issued the joint fiat, and which was to all intents and purposes a legal fiat at the time it was issued, ought not to suffer from the act of God, by the death of *T. Norris*, and that he has the better claim to a separate fiat against the surviving partner.

Sir GEORGE ROSE.—The only question is, whether the petitioning creditor under the joint fiat shall not have a reasonable time to issue another fiat; and whether the party who makes this application to the Court should be permitted to snap up a separate fiat, before the other party had any option given to him, whether he would issue another fiat against the surviving partner. I think he has been guilty of no unreasonable delay, before he tendered fresh docket papers for the separate fiat, and that he ought to be preferred to the present applicant.

Mr. *Swanston* then applied, on behalf of his client, for the costs of the present application; contending that his client had been perfectly regular, and ought to be indemnified from the costs of being brought here, which was occasioned by the delay, whether reasonable or not, of the other party.

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NORRIS  
and another.

The COURT, however, declined to allow the costs.

Application dismissed.

Ex parte JAMES WHISSON.—In the matter of JOHN  
CARTER.

Westminster,  
April 27, 1839.

An official assignee is not entitled to any commission on the amount of the proceeds of the sale of the bankrupt's mortgaged property, which were paid over by the purchaser to the mortgagee, and which were not sufficient to satisfy the debt due on the mortgage; the official assignee having rendered no services in effecting the sale. He is only entitled to such an allowance out of the bankrupt's estate to remunerate his services, as shall appear to the Commissioner, upon consideration of the bankrupt's property, and the nature of the duties of the official assignee, to be just and reasonable.

THIS was the petition of the creditors' assignee against the allowance of a certain sum for commission, made by the commissioner to the official assignee, under the following circumstances:

The bankrupt had, before his bankruptcy, deposited with Messrs. *Reid & Co.* the lease of the public house occupied by him, as a security for monies then due, or to become due, from him for money lent and beer supplied by *Reid & Co.* The lease of this house, with the fixtures, and the goods and effects contained in it, constituted the whole of the bankrupt's property. The petitioner, as assignee of the bankrupt's estate, entered into a treaty with a purchaser for a sale of the lease, subject to this equitable mortgage; and accordingly a deed of assignment was prepared to which the petitioner, the official assignee, and *Reid & Co.* were parties, by which, in consideration of 700*l.* paid by the purchaser to *Reid & Co.*, in part satisfaction of the debt due to them from the bankrupt, the lease was assigned to the purchaser for the remainder of the term. The official assignee at first objected to execute the lease, on the ground that the 700*l.* ought to have passed through his hands, in order that he might have deducted his commission on that sum; but he eventually executed the assignment, reserving his claim for commission. The petitioner al-



leged, that the official assignee did not in any way interfere, or take any trouble, in effecting the sale of the property. At a meeting before the Commissioner to discuss the right of the official assignee to commission on the purchase money, the Commissioner decided that he was so entitled. At the audit meeting the official assignee produced the account of his receipts and disbursements, in which there was a charge of 11*l.* 10*s.* for commission on the above-mentioned sum of 700*l.*, and another charge of 1*l.* 15*s.* for commission on 35*l.* paid to the landlord of the premises for rent due from the bankrupt, which charges were allowed by the Commissioner. This petition was presented by way of appeal from his decision.

The petitioner contended, that the official assignee was not entitled to commission on a mortgage debt; especially when the property encumbered, as in the present instance, could not be considered the property of the bankrupt, but of the equitable mortgagee, the property not being worth the sum due on the mortgage; and it was also urged, as a reason against the allowance of the claim of the official assignee, that in a case where the mortgage debt was of large amount, the commission might absorb the whole surplus of the bankrupt's estate.

The official assignee insisted, that the 700*l.* should have been paid through his hands, and he would then have been entitled to commission upon it, as money actually received by him, and that he ought not to be deprived of his commission by the mode of payment.

Mr. *Koe*, and Mr. *J. Russell*, in support of the petition. It is settled by *Ex parte Tiplady* (a), that this

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Ex parte  
Whisson.

(a) 3 Deac. &amp; C. 570.

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Court has jurisdiction to entertain a petition against the allowance made by the Commissioner to the official assignee. In the present case, the sum of 700*l.*, on which the official assignee has charged commission, was not the property of the bankrupt, but of Messrs. *Reid & Co.* [Sir *George Rose*. Are not you conceding too much? Suppose it is part of the bankrupt's property, how is the official assignee entitled to commission on it?] It is difficult to say, how he can be entitled to commission on money, which he never received. There is no entry on the proceedings, on what ground the Commissioner allowed the official assignee's charge for commission on this sum. The official assignee took no trouble in procuring a purchaser for the property, or in any part of the transaction. Then, with respect to the sum charged for commission on the amount of the rent paid to the landlord,—there is not a pretence for the official assignee making such a charge. The question is, in fact, whether the official assignee, when not a shilling comes to the bankrupt's estate to be divided amongst the creditors, is entitled to any per centage, by way of commission.

Mr. *Swanston*, for the official assignee. It would be very desirable that the Court should look at the proceedings under the fiat, to see the principle on which the Commissioner directed this allowance to be made to the official assignee. If the Commissioner calculated the allowance to him for his services, and referred to the 700*l.* as the value of the bankrupt's lease, that, it is submitted, will not vitiate the allowance. The Court should have the certificate of the Commissioner, in order to know what he has done.

Mr. *Koe* was heard in reply.

Sir JOHN CROSS.—It appears in this case, that the sum claimed by the official assignee is not in the nature of a compensation for any services rendered by him, but as *commission* on a certain sum paid to Messrs. *Reid & Co.* at so much per cent. Now, I am at a loss to know what right he has to any *commission* on this sum. The law does not recognize any allowance to the official assignee for commission, but merely authorizes the Commissioner to make such allowance to him, as the services rendered by him, and the amount of the bankrupt's estate, may justify the Commissioner in ordering (a). The Commissioner, therefore, is bound to look to the nature of the services of the official assignee, and the amount of the bankrupt's property. Now, if the Commissioner has in this case calculated any allowance to the official assignee in respect of the sum of 700*l.*, which was not the property of the bankrupt, he has done wrong, and that allowance must be rescinded.

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Sir GEORGE ROSE.—It appears to me very immaterial, whether this sum of 700*l.* was the property of the bankrupt, or not; the only question being, in my apprehension, whether the official assignee was entitled to any sum in the nature of *commission* on the produce of the sale of property, in effecting which no services were rendered by him. The case of *Ex parte Tiplady* (b), which has been referred to, does not touch this question. There, the only question was, whether the official assignee was entitled to so much—*here*, the only question is, whether he is entitled to any thing. Suppose the official assignee had refused to execute the conveyance to the

(a) See 1 & 2 Will. 4. c. 56. s. 57.

(b) 3 Deac. & C. 570.

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purchaser, unless he was paid the sum he claimed for commission out of the proceeds of the sale,—I much question, whether this Court would not have ordered him to execute the conveyance, and pay the costs of the application. Or, suppose he should take the amount of this claim for commission out of the general estate of the bankrupt, the sum to which he had so helped himself would in that case form an item in his accounts, and ought to be disallowed by the Commissioner when the accounts were audited. His Honour then suggested the Order, which was finally adopted by the Court.

The ORDER was, a declaration that the official assignee was not entitled to any charge for commission, in respect of the sum of 700*l.*; that it should be referred back to the Commissioner to review the allowance made by him to the official assignee, having regard to such declaration; and if the Commissioner should be of opinion that such allowance was too much, then that the Commissioner might reduce the allowance; but the allowance to stand, if the Commissioner should be of a contrary opinion; and that the costs of both parties should be paid out of the estate.



Ex parte JACKSON, RIDDLE, & Co.—In the matter of  
WARWICK and CLAGETT.

1839.

Westminster,  
April 22 and 30,  
1839.

**THIS** was a petition for the rehearing of a former petition, and for a reversal of the order made thereon, dated the 12th July 1838, by which the Court ordered that a certain proof, made by the petitioners against the separate estate of *W. S. Warwick*, should be expunged. The facts of the case, as they appeared on the previous hearing, are stated in the former Report, *ante*, page 365.

The present petition alleged, that the petitioners resided in the United States of America, and that none of them were in this country at any time between the presenting and hearing of the former petition, or had any opportunity of communicating with their agent, touching the matters contained in it, or of making affidavits in opposition to it; and that the petition was not heard, with such evidence as they could have made available, had they been in this country; but that Mr. *Jackson* having occasion to come to England, he found that the petition had been heard previous to his arrival.

The petition then, by way of supplement to the former petition, alleged that *A. and J. Warwick* did, for the purpose of reimbursing the petitioners the amount of the bills of exchange drawn by them on the petitioners, and of paying other bills drawn on *W. S. Warwick*, consign to him, both before and after the commencement of the partnership between him and *Clagett*, large quantities of tobacco, and divers bills of exchange; but that such consignments and remittances, and the transactions connected therewith, were entered and kept in the separate books of *W. S. Warwick*, distinct from the transactions of the

The previous decision in *Ex parte Whitmore*, (see *ante*, page 365), confirmed on a re-hearing, although the account of the dealings between the parties, in respect of which the petitioners claimed a right of proof against the separate estate of *W. S. Warwick*, was kept separate both in the books of the bankrupts, and the petitioners.

Although the 1 & 2. W. 4. c. 56. s. 32. directs that the decision of the Court of Review, on any appeal from the Commissioner on a question of proof, shall be final, unless an appeal to the Lord Chancellor is lodged within a month, the Court of Review under special circumstances, permitted a case of this description to be reheard, notwithstanding the petition for rehearing was not presented until six months after the former hearing.

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partnership. That part of the tobacco was sold by *W. S. Warwick*, and the proceeds received by him, and other part was pledged for his own debts and liabilities, or for those of himself and his partner; and that the bills of exchange remitted by *A. and J. Warwick* were negotiated partly by *W. S. Warwick*, and partly by him and his partner, and the proceeds received and disposed of for his and their respective use and benefit. That in the books and accounts of *W. S. Warwick*, credit was given to *A. and J. Warwick* for the tobacco so consigned, and the bills so remitted; and that he charged them with all bills which had been drawn and accepted by him, or by himself and his partner, on account of *A. and J. Warwick*. That it appeared by the account current books of *W. S. Warwick*, that the several bills of exchange (mentioned in the former petition to have been drawn by the petitioners on *Warwick & Clagett*,) were accepted by *Warwick* and *Clagett*, on account of *W. S. Warwick*, and were respectively charged by him to *A. and J. Warwick* in his account with them; and that all these bills were drawn against the consignments and remittances made by *A. and J. Warwick* to *W. S. Warwick*, for the purpose of reimbursing the petitioners the advances made by them to *A. and J. Warwick*. That the three several bills, which were mentioned in the former petition as having been drawn upon the petitioners by *A. and J. Warwick*, under the letter of credit of *W. S. Warwick*, were accepted and paid by the petitioners; and that upon the acceptance of these bills, the same were charged in the books of the petitioners to the account of *A. and J. Warwick*, merely for the purpose of keeping the account under the letter of credit distinct from any other; and that the whole of the transactions connected with the letter of credit, and the

acceptances of the petitioners in respect thereof, as well as the five bills drawn by the petitioners upon *Warwick & Clagett* for their reimbursement, were entered in the books of the petitioners to the account of *A. and J. Warwick*. That the petitioners never accepted the credit of *Warwick & Clagett* in lieu of the credit of *W. S. Warwick*, and that they always considered *W. S. Warwick* as their debtor, for the advances made by them under the letter of credit; and that as the account opened on the credit of *W. S. Warwick* was altogether distinct from the joint exchange account between the petitioners and *W. S. Warwick*, the petitioners did not consider the terms "credit, advices, and instructions," contained in *W. S. Warwick's* letter of the 1st October 1836, and in the letter of *Warwick & Clagett* of the 6th October 1836, as extending to the account so opened on the credit of *W. S. Warwick*, in favor of *A. and J. Warwick*; and that, by the open accounts referred to in the letter of the petitioners of the 15th November 1836, were only meant the joint exchange accounts, and had no reference whatever to the account so opened on the credit of *W. S. Warwick*.

The petitioners alleged, that they drew the five bills of exchange upon *Warwick & Clagett*, merely as a mode of reimbursement, and in the belief that it would be more convenient to *W. S. Warwick* to draw them in that manner than on him alone; more especially as the petitioners had reason to expect that he would shortly visit the United States, and might probably be absent from London when the bills would arrive there, or become payable; and also because bills drawn upon *W. S. Warwick* alone, after the commencement of his partnership with *Clagett*, would not be so current in the market as bills

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drawn upon the firm; and the petitioners alleged, that they did not, by drawing the bills on *Warwick & Clagett*, intend to release *W. S. Warwick* from his liability on his letter of credit, or to accept *Warwick & Clagett* as their debtors, instead of *W. S. Warwick*; the petitioners being utter strangers to *Clagett*, and knowing nothing of his respectability.

The petition then stated, that *A. and J. Warwick* did not in any way acknowledge or recognise the partnership of *Warwick & Clagett*; and accordingly all the bills drawn by them were drawn upon *W. S. Warwick* alone, although some of the bills were (without the sanction or authority of *A. and J. Warwick*) accepted in the name of the partnership firm of *Warwick & Clagett*; and that all the correspondence touching these transactions, on the part of *A. and J. Warwick*, was addressed to *W. S. Warwick* separately, and all the accounts respecting such transactions were entered in the books of *A. and J. Warwick*, to the account of *W. S. Warwick* alone; and that they never authorized any transfer to *Warwick and Clagett* of the credit of *W. S. Warwick*, by which *A. & J. Warwick* were authorized to draw upon the petitioners, nor any transfer by *W. S. Warwick* to *Warwick & Clagett*, of any funds of *A. and J. Warwick*, which were in *W. S. Warwick's* hands, at the time of his forming a partnership with *Clagett*.

*Mr. Swanston, Mr. Lee, and Mr. Reynolds*, on behalf of the respondents, took a preliminary objection to the hearing of this petition, which they contended was wholly irregular, and that the Court had no jurisdiction to entertain it. By the stat. of 1 & 2 Will. 4. c. 56. s. 32., it is provided, "that if the Court of Review shall determine, in any appeal touching any decision in matter of



law, upon the whole merits of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month after such determination." Now, in the present case, the petitioners have let not only one month, but more than six months, elapse, before they took any proceeding to set aside the former order; they are consequently estopped from appealing to the Lord Chancellor against the former decision of this Court. But if they are to be permitted, by means of this petition, to revive the former proceeding, they might then appeal to the Lord Chancellor against any order which the Court may make upon this petition; although their own laches prevent them from appealing against the former order. Mr. *Jackson*, the present petitioner, remained in England some time after the former order, and yet he took no steps to apply for a rehearing, or to set aside the former order. This delay will operate very prejudicially to the rest of the creditors. For, by the 31st section of the statute before referred to, it is provided, "that in all appeals on the question of the right of proof, a sum not exceeding any expected dividend or dividends, on the debt in dispute in such proof, may be set apart in the hands of the Accountant-General, until the appeal is disposed of." So that a large sum of money has, by reason of the delay of the petitioners in presenting this petition, already been locked up from the general body of the bankrupt's creditors, ever since the 12th July last, a period of more than nine months.

The COURT, however, overruled the objection; Sir *John Cross* saying, that he did not think that the former

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petition ought to be considered an *appeal*, in a strict legal sense, although it was called so by the act of parliament; for, on a petition against the decision of the Commissioners on a question of proof, the Court hears new evidence in the case, which is not done on the hearing of an appeal.

For the convenience of the parties, the case was then ordered to stand over.

April 30.

Mr. *J. Russell*, and Mr. *Bethell*, in support of the petition. The important question for the consideration of the Court is, whether there is evidence of any new contract between these parties; that is, a substitution of a new contract for the old, after the 1st October 1836, when *W. S. Warwick*, in a letter of that date, announced to *Jackson, Riddle & Co.*, that he had taken *Clagett* into partnership. We submit, that the correspondence between the parties plainly shows, that it never was the intention of *Jackson, Riddle & Co.* to substitute a new contract. And there is nothing in it, which shows, that *Clagett* knew of the letter of credit given by *W. S. Warwick* in favour of *A. & J. Warwick*, when the letter of the 6th October was written. Then, with respect to the five bills of exchange, which the petitioners drew upon the new firm of *Warwick & Clagett*,—that was done merely as a mode of reimbursement, and does not amount to evidence of an agreement, on the part of the petitioners, to substitute the liability of *Warwick & Clagett* for the separate liability of *W. S. Warwick*. [Sir *John Cross*. You may take it for granted, that the Court will not decide, that there is a new contract, merely because these bills of exchange were drawn upon *Warwick & Clagett*.] We have it expressly deposed to by

two persons connected with the house of *Jackson, Riddle & Co.*, that it never was their intention to transfer the debt of *W. S. Warwick* to the firm of *Warwick & Clagett*. It would appear, from what fell from the Judges of this Court on the former hearing, that the Court thought, that the circumstance of the bills being drawn by the petitioners on the firm of *Warwick & Clagett*, and being accepted by that firm, was sufficient evidence of an agreement, by the petitioners, to substitute the liability of *Warwick & Clagett* for the separate liability of *Warwick*. We contend, however, that as far as relates to the liability of *W. S. Warwick* for the dealings of *A. & J. Warwick* with the petitioners in America, this circumstance does not prove that the petitioners consented to any transfer of his separate liability to the new firm. The original arrangement was between three parties, *W. S. Warwick*, *A. & J. Warwick* (the Virginia house), and *Jackson, Riddle & Co.* Then, how is an arrangement between only two of these parties, namely, *W. S. Warwick*, and *Jackson, Riddle & Co.* to be substituted for an arrangement between the three,—when *A. & J. Warwick* are no parties to this subsequent arrangement? The dealing between *A. & J. Warwick* and *W. S. Warwick* goes on in the same way as it did before; it is sworn, that they never recognized the partnership of *Warwick & Clagett*, and accordingly drew all their bills on *W. S. Warwick* alone. This is a strong circumstance to show, that *A. & J. Warwick* were no parties to any transfer of the liability to the new firm. The additional facts on this petition are, that although one account, namely, the joint exchange account, was transferred to the new firm of *Warwick & Clagett*, the accounts of the transactions with *A. & J. Warwick* in the letter of credit

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from *W. S. Warwick*, were kept perfectly distinct by *Jackson & Co.*, and were also entered in the separate books of *W. S. Warwick* distinct from the transactions of the partnership. The letter of credit never, in fact, became a part of the partnership transactions of *Warwick & Clagett*. It has been decided, that a proposal by the debtor to substitute, and an acceptance by the creditor of, another liability, did not amount to a positive agreement on the part of the creditor to release the former liability; *David v. Ellice (a)*. In that case, *A. B. & C.* were in partnership in trade. *A.* retired from the firm; and notice of that fact was given to *D.*, a creditor of the firm, and that *B. & C.* continued the business, assumed the funds, and charged themselves with the debts of the partnership. The balance due to *D.* was transferred to his credit by the new firm, and *D.* was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insolvent, it was held that *C.* continued liable for the debt due to *D.* from the old firm. That case is not so strong as the present, in favour of the continuance of the liability of the former firm. It is true, that in the subsequent case of *Thompson v. Percival (b)* some doubts were thrown upon the correctness of the former decision. In the last-mentioned case the facts were these:—*A. & B.* dissolved partnership, and agreed that the business should be carried on by *B.* alone, and that he should receive and pay all debts; sufficient funds being left in his hands for that purpose. *C.*, a creditor of the firm, afterwards applied to *B.* for payment of his debt, and was told by him that *A.* knew

(a) 5 B. &amp; C. 196.

(b) 5 B. &amp; Adol. 925.

nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured; and it was held, in an action brought by *C.* against *A. & B.* (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both; and that such an agreement and receipt of the bill would be a good defence to *A.*'s suit, by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf. These cases are cited to show, that in each of them there was an *express agreement* between all the parties to the transaction; while in the present case, as we contend, there is not even an implied agreement.

Mr. *Swanston*, Mr. *Lee*, and Mr. *Reynolds*, were not heard for the respondents.

Sir JOHN CROSS.—I think this case was fully heard, when it was before us on the former occasion. But as the petitioners are foreign merchants, and allege, they had then no opportunity of adducing evidence in opposition to the prayer of the petition, they have applied for a second hearing on further evidence, which, they allege, they were not prepared with, when the case was last before us. The further evidence consists of several branches. In the first place, there is the evidence of the respondents themselves; but this, being offered to

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us *ex post facto*, I do not think is much to be depended upon. It is then put, that it could never be the intention of the petitioners to substitute the joint liability of *Warwick & Clagett* for the separate liability of *Warwick*, as the petitioners knew nothing of *Clagett*, and had reason, therefore, to be doubtful of his responsibility. This view of the case I do not agree with. When it was first proposed to draw bills on two persons instead of one, I think it never entered into the contemplation of the parties at that time, that this was not a good security. The reason, therefore, assigned by the petitioners for drawing the bills on *Warwick & Clagett*, instead of *W. S. Warwick*, does not appear to me to carry the case further. There is, then, the evidence of *A. & J. Warwick*, the Virginia house, as to their mode of drawing on *W. S. Warwick*, instead of the new firm; but this is immaterial, to explain any dealings between the petitioners and *Warwick & Clagett*. Another branch of evidence now offered to us, is the mode in which the petitioners kept the accounts of all the transactions arising out of the letter of credit; but this does not appear to me to be more material, than the other points I have adverted to. In the report of the former argument of this case by Messrs. *Montagu & Ayrton* (a), there is a long judgment of the Commissioner inserted, in which a cloud of cases are cited, enough to mystify any question. Here, as it seems to me, the question is purely one of fact. On the 20th June 1836, *W. S. Warwick* gives a letter of credit upon the petitioners, in favour of *A. & J. Warwick*, to provide payment for different purchases of tobacco. On the 1st October, *W. S. Warwick*, having taken *Clagett* into partnership, writes to

(a) 3 Mont. & A. 634.

the petitioners, to announce to them that fact, saying, "I beg that you consider all credits, advices, and instructions, now in force from me, as extending to the firm of *Warwick & Clagett*." Then, on the 6th October, the new firm of *Warwick & Clagett* wrote to the petitioners another letter, repeating, and expressly confirming, the request contained in the previous letter of the 1st October. To these letters the petitioners, in their answer of the 15th November, addressed to *Warwick & Clagett*, say, "We shall make up, and transfer to your new firm, the open accounts in joint exchange transactions, but hope to have your account current, made up to ours, transmitted, before we carry the old account over to your firm." They, therefore, suspend the transfer of the general account, merely until they are furnished with the account current of *Warwick & Clagett*; which, it appears, was transmitted by the letter of the 3rd November. The Court does not infer the intention of the parties, by the mere drawing of the bills by the petitioners on the firm of *Warwick & Clagett*, but by the letters of the 1st and 6th October, and by the drawing of the bills, in pursuance of those letters. But now it is said, that the petitioners drew the bills on *Warwick & Clagett*, without their authority. I cannot agree with that construction of the dealings between these parties. I am of opinion, that the partnership of *Warwick & Clagett* was bound to accept the bills so drawn by the petitioners; and that an action would have laid against them, if they had refused to accept the bills. I can only account, in one way, for the petitioners coming here again, after the order made on the former hearing,—and that is, on the supposition that *Warwick's* separate estate is expected to pay a better

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dividend, than the joint estate of *Warwick & Clagett*. There has been nothing urged on the hearing of this supplemental petition, to induce me to change my former opinion.

Sir GEORGE ROSE, after commenting on the correspondence between the parties, said, that he also still retained the opinion he expressed on the former hearing.

Petition dismissed.

Ex parte GEORGE HOLMES.—In the matter of JOSEPH GARNER.

Westminster,
May 25, 1839.

A. accepted four bills for the accommodation of B., which B. indorsed and deposited with his bankers, as a collateral security for his floating balance with them. B. became bankrupt, when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof these four bills, among others, as securities then held by them; and they afterwards received a dividend of 2s. in the pound on the amount of their proof.

The bills were subsequently paid in full by A.—*Held*, that the bankers were not bound to refund to A. the dividend of 2s. on the amount of the bills, and that A. was only entitled to stand in their place, in respect of any future dividends on the bills.

THIS was the petition of a surety to stand in the place of the creditor, who had proved under the fiat, to the extent of the sum paid by the petitioner in respect of his suretyship for the bankrupt, under the 52nd section of the Bankrupt Act.

The petitioner, as surety for the bankrupt, had accepted four bills of exchange, drawn by the bankrupt, and made payable to himself; one dated 30th November 1836, for 183*l.* 11*s.*, payable three months after date; another of the same date, and payable at the same time, for 137*l.* 14*s.* 6*d.*; another dated 7th February 1837, for 127*l.* 10*s.*, payable three months after date; and another of the same date for 75*l.*, and payable two months after date. These bills, amounting together to 523*l.* 15*s.* 6*d.*, were severally indorsed by the bankrupt,

and were deposited with his bankers, Messrs. *Goodall & Co.*, of Coventry, as a collateral security for his floating balance with them. The fiat issued against the bankrupt on the 9th March 1837; and, at the time of his bankruptcy, the amount of the balance owing by the bankrupt to Messrs. *Goodall & Co.* was 7526*l.*; which sum they proved under the fiat, exhibiting the securities held by them for such balance, and amongst them the four bills of exchange drawn by the bankrupt upon the petitioner. On the 10th October 1837, a dividend of 2*s.* in the pound was declared, and was paid to *Goodall & Co.* on the amount of the debt so proved by them. Since the issuing of the fiat, the petitioner had been compelled to pay the whole amount of his four acceptances to Messrs. *Goodall & Co.*; upon which they delivered up to him the four bills, but refused to allow him the dividend of 2*s.* on the amount of the bills. A meeting to declare a further dividend having been held, the petitioner applied to prove for the sum of 523*l.* 15*s.* 6*d.*, the amount of the four bills; but the Commissioners refused to admit the proof.

The prayer was, that the petitioner might be declared entitled, as between him and *Goodall & Co.*, to the benefit of and to stand in their place, in respect of their proof, to the extent of 523*l.* 15*s.* 6*d.*, and in respect of the past and future dividends on such proof to the extent of that sum; and that *Goodall & Co.* might be ordered to refund and pay to the petitioner the amount of the dividend of 2*s.* in the pound on that sum; or that, if necessary, the assignees might be ordered to pay the amount of such past dividend to the petitioner out of any subsequent dividends which might be payable to *Goodall & Co.* on the balance of their proof, after

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deducting the amount of the petitioner's acceptances; and that the assignees might be ordered to pay to the petitioner all future dividends on the debt proved by *Goodall & Co.*, to the extent of the amount of the said four acceptances, and might be restrained from paying to *Goodall & Co.* such future dividends, as well as any future dividends, on the balance of their debt, until repayment to the petitioner of the dividend of 2s. on the amount of the petitioner's acceptances; or that the petitioner might be declared entitled to go in and prove under the fiat for the amount of such four acceptances, and to receive dividends thereon equally with the other creditors, not disturbing the former dividends; and that in such last case the proof of Messrs. *Goodall & Co.* might be reduced, and ordered to stand only as a proof for the amount proved, less the amount of the petitioner's acceptances.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition, referred to the case of *Ex parte Brunskill* (a), where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, having proved the amount of the balance due, excepting the bills as a security,—and some of the bills having afterwards been paid in full,—it was held, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt. In the present case, the petitioner has paid the whole amount of the bills—he has therefore paid the whole amount of the debt, for which he was surety. The words of the act (b) are, “if he shall have

(a) 4 Deac. & C. 442.

(b) 6 Geo. 4. c. 16. s. 52.

paid the debt, or any part thereof, in discharge of the whole debt," the surety is then declared entitled to stand in the place of the creditor who has proved, as to the dividends, and all other rights under the commission which the creditor possessed, or would be entitled to, in respect of the proof. The debt, for which the petitioner was surety, was the amount of the four bills of exchange, accepted by him for the accommodation of the bankrupt; and his right, as surety, does not depend on the form of the proof of the creditor.

Then, as to the right of the petitioner to the return of the dividend, which has been received on the amount of the bills. The bills themselves cannot produce more than their nominal amount; and as the petitioner has paid the bills in full, he is entitled to be allowed the 2s. in the pound, which Messrs. *Goodall & Co.* have received on the amount of them. [Sir *John Cross*. You were security for the whole debt due from the bankrupt to Messrs. *Goodall & Co.*, who have only received 2s. in the pound on the amount of their debt. They might, in fact, have received 18s. in the pound on the whole amount, and have even come upon you on the bills for the remaining 2s.] If the surety had offered to pay Messrs. *Goodall & Co.* 18s. in the pound on the amount of the bills, after they had received the dividend of 2s. in the pound, he would have had a right to have them delivered up to him. The creditors could not say, that these bills were a security for a larger debt, than their actual amount. They have not a right to divide the debt they have proved into integral parts, and place the 2s. in the pound to other parts of the debt, excluding these bills. In *Ex parte Rushforth (a)*, where a surety joined in a bond to a

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(a) 10 Ves. 409.

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banker for 10,000*l.*, for payment, within two months after notice, of every sum of money, which the obligee should at any time pay or advance on account of the principal, by payment of or discounting bills or drafts; and the principal conveyed an estate to the surety, as an indemnity, and afterwards became a bankrupt; upon which the obligee proved under the commission a debt of 20,000*l.*, as due from the bankrupt upon the balance of the standing account;—the surety in that case, upon payment of the 10,000*l.*, was held entitled to the benefit of such proof, to the amount of the difference between the 10,000*l.* and the value of the proceeds of the sale of the estate. There, although the creditor had proved for the whole debt due to him, and had received only a portion of the debt, the surety was permitted to prove for what the creditor had received. *Walker v. Hardman* (a) is, also, to the same effect. It makes no difference, in the right of the surety to stand in the place of the creditor, whether he is surety for the whole, or for only a part of the debt. Besides, it is not in proof here, that the surety gave the bills to secure a floating balance, that might be due from the bankrupt to *Goodall & Co.* [Sir *John Cross*. It is stated in the petition, that he accepted the bills for the accommodation of the bankrupt, and to enable him to continue his account with *Goodall & Co.*, as his bankers.] The only contract was, that when the bills should respectively fall due, the petitioner would pay the amount of them. The affidavit in support of the petition states, that the four bills were merely accepted by the petitioner for the accommodation of the bankrupt, for the purpose of assisting him in his business.

(a) 11 Bligh, 229; 4 Clark & Fin. 215.

Mr. *Swann*, *contra*. The question is, for what purpose the bills were deposited by the bankrupt with the bankers. They call upon the petitioner to pay no more, than what he was liable to pay upon the bills. With respect to the alleged right of the petitioner to come in and prove as surety,—the petitioner was surety for the whole debt owing from the bankrupt to the bankers. Then, has he paid this debt? At the time the bills were due, the petitioner was not prepared to pay them, and applied to *Goodall & Co.* for forbearance, and to give others for them; which he did. These new securities were given after *Goodall & Co.* had proved the amount of their debt; and the petitioner did not then make any claim on *Goodall & Co.* to refund any part of the dividend, which they had received on the amount of their debt. Although, as between Messrs. *Goodall & Co.* and the bankrupt's assignees, the portion of their debt received by them in respect of these bills might be expunged from their proof, yet the petitioner can have no right to prove in their stead. In *Soutten v. Soutten* (a), where a surety in a warrant of attorney, *in order to discharge himself from his personal liability*, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record; it was held, that this did not fall within the former provision of the bankrupt law on this subject, 49 *Geo. 3. c. 121. s. 8.*, as being a payment of part of a debt in discharge of the whole; and that, consequently, the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. So in *Ex parte Sammon* (b), where bills

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(a) 5 B. & Ald. 852.

(b) 1 Deac. & C. 564.

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amounting to 1320*l.* were delivered by the drawer to a creditor, as collateral security for a debt of 4000*l.*; and the drawer and acceptor became bankrupt, but the estate of the creditor proved solvent; it was held, that the creditor was entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000*l.*, and receive dividends in liquidation of the remaining portion of his debt, under the commission against the drawer. In the present case, as the bills were not paid by the petitioner in discharge of the whole debt due from the bankrupt to Messrs. *Goodall & Co.*, the petitioner cannot avail himself of the provision of the act of parliament. Besides, Messrs. *Goodall & Co.* had no notice whatever that these bills were accommodation bills. They say, that they were not accommodation bills.

Mr. *Steere*, for the assignees, submitted to any order of the Court.

Mr. *Swanston*, in reply. Messrs. *Goodall & Co.* have received 2*s.* in the pound from the bankrupt's estate, and 20*s.* in the pound from the surety, on the amount of these bills. In common honesty they ought, therefore, to return the 2*s.* in the pound to the surety. From the nature of the transaction itself, the bills cannot be a security for more than the amount for which they were given. How can it be said, that a dividend has not been paid on the bills, as well as on the whole debt; when Messrs. *Goodall & Co.* have received a pound rate upon every portion of their debt, including these bills? In *Ex parte Barrett (a)*, where a creditor had proved

(a) 1 G. & J. 327.

in respect of several bills of exchange, drawn by the bankrupt and discounted by the creditor, and one of those bills was subsequently wholly paid; it was held, that so much of the proof as related to that bill must be expunged.

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Sir JOHN CROSS.—In this case it appears, that a debt of upwards of 7000*l.* was due from the bankrupt to Messrs. *Goodall & Co.* at the time of his bankruptcy, for which they held various securities,—among others, these four bills. The petitioner alleges, that, having paid the whole amount of the bills, he has a right to stand in the place of Messrs. *Goodall & Co.*, as to this portion of their debt; and that the dividends, which they have received to that extent, ought to be returned to the petitioner. I am of opinion, however, that the petitioner was surety for the whole floating balance that might be due from the bankrupt to *Goodall & Co.*, and not for the amount of these bills alone. Therefore, if *Goodall & Co.* had received the whole of the 7000*l.*, excepting merely the amount of these four bills, the petitioner would be bound, as the acceptor, to pay the full amount of the bills. And I think, that the bankruptcy of the principal debtor makes no difference in the case.

Sir GEORGE ROSE.—It is stated in the petition, that these bills were lodged by the bankrupt in the hands of his bankers, as deposits to secure his floating balance with them. Now, the proper mode of dealing with the bills, when the bankers came to prove the amount of the balance due to them against the bankrupt's estate, would have been for the Commissioners to have directed

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the bills to be sold, and for the bankers to have proved for the residue, after deducting the proceeds of the sale. The petitioner, however, has no right to the antecedent dividend, which has been received by the bankers on the gross amount of their debt. What is the equity of the surety in such a case under the act of parliament? He has only a right to stand in the place of the creditor, as to the dividends which the creditor would be entitled to, in respect of the proof, in case he shall have paid the debt, or any part thereof, in discharge of the whole debt. You cannot, by expunging merely a portion of the debt, under these circumstances, get back dividends already paid, not on these bills in particular, but on the gross amount of the balance due from the bankrupt to Messrs. *Goodall & Co.* Suppose an action at law had been brought by *Goodall & Co.* against the acceptor of these bills, could the defendant in such action say, that the plaintiff had got 2*s.* in the pound on the amount of the debt, for which the bills were deposited as a security? There can be no doubt, that such a defence would break down on the trial. The proof in this case was not on the bills, but for a general debt of 752*6*l. If the petitioner had filed a bill against the plaintiffs in the action, for an injunction to stay the proceedings at law, offering to pay the difference between the amount of the bills and the 2*s.* in the pound, which had been received by the creditor on the gross amount of his debt under the fiat,—no Court of Equity would grant such an injunction. As to the case of *Ex parte Rushforth* (a), which was cited in support of the prayer of this petition, there the payment made by the surety was of the *whole* debt due

(a) 10 Ves. 409.

from the principal debtor; and there was a bond given by the surety to the creditor, expressly limiting the responsibility of the surety to the amount of 10,000*l.*; the creditor had therefore in that case no right to bind the surety beyond the 10,000*l.* The decision in that case, also, proceeded on the payment by the surety of the entire debt. As to the right of the petitioner to any dividends on the amount of the bills, the assignees may be considered as trustees for the petitioner, in respect of any future dividends; but the petitioner has no claim to have any dividends returned to him, which have been already paid.

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The ORDER was, that the petition, as against *Goodall & Co.*, should be dismissed, with costs; but the Court declared, that the petitioner was entitled to receive, instead of *Goodall & Co.*, out of the estate of the bankrupt, all future dividends in respect of the amount of the petitioner's acceptances; and that the costs of the petitioner, other than those already directed to be paid by him, should, as well as the costs of the assignees, be paid out of the bankrupt's estate.



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Ex parte SAMUEL WALKER and others.—In the matter of THOMAS FIDGEON, EDWARD GETLEY, and HENRY LOMAS.

Westminster,
June 10, 1839.

A., B., and C., partners in trade, together with D. as their surety, enter into a joint and several bond to their bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond, there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but, at the time of the bankruptcy of A., B., and C., a much larger balance was due from them to the bankers, than the sum secured by the bond. D., the surety, died; and in a creditor's suit brought by the bankers against his representatives,—to which suit the assignees of A., B. and C. were also parties,—it was found, that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that should become due to them; but that the surety intended the bond to be a security only for the particular balance due to them at the date of the bond.—*Held*, that the bond was, under these circumstances, proveable by the bankers against the separate estate of A., for the whole amount of the principal and interest secured by it.

Semble, that the proceedings in the Chancery suit were admissible in evidence on this petition; the assignees being parties in both proceedings, and the subject-matter being the same, although the question in the suit was the liability of the surety, and the question in this petition the liability of the principal debtors, on the bond.

THIS was a petition to prove the sum of 10,341*l.* 10*s.* against the separate estate of *Thomas Fidgeon*, under the following circumstances.

The petitioners carried on business as bankers at Sheffield, in partnership with *Thomas Walker* and *Richard Stanley*, deceased; the latter being the acting partner in the business.

On the 1st January 1815, the bankrupt, *Henry Lomas*, who had been previously engaged in business as a merchant in Sheffield, formed a partnership with the two other bankrupts, *Thomas Fidgeon* and *Edward Getley*, who were then of Birmingham; which partnership business was carried on at Sheffield under the firm of *Henry Lomas & Co.*,—at Birmingham under the firm of *Fidgeon, Getley & Co.*,—and in London under the firm of *Thomas Fidgeon & Co.*,—until their bankruptcy, which happened in May 1816. Previous to the partnership thus formed, *Henry Lomas* kept an account with the petitioners, as his bankers; and the firm of *Henry Lomas & Co.* continued to deal with them on the footing of the previous account. In August 1815, the petitioners held undue bills, which had been brought in by, and credited to, the firm of *Henry Lomas & Co.*, to the amount of 30,000*l.*;

but notwithstanding this credit, the amount of the sums debited by the bankers to that firm exceeded the amount of the sums so credited; and *Henry Lomas* was then making frequent applications for further advances, which the bankers refused to make, without further security; upon which *Henry Lomas* and his partners, together with *William Fidgeon* as their surety, entered into a joint and several bond to the bankers for 20,000*l.*, which was dated the 26th August 1815, and conditioned for the payment of 10,000*l.* upon demand, with interest from the date of the bond; which bond, the petitioners alleged, was intended to secure any eventual balance that might be due from *Henry Lomas & Co.*, to the extent of 10,000*l.* At the date of the bond, the sums debited to the firm of *Henry Lomas & Co.*, in their account with the bankers, exceeded the sums credited to that firm by the sum of 2375*l.*; and the bankers then held undue bills, which had been credited to the firm, to the amount of 44,596*l.*, of which five bills, amounting to 3820*l.*, were subsequently dishonoured, and have never been paid. If a balance had been struck up to the date of the bond, the before-mentioned sum of 2375*l.* would have appeared to be due from *Henry Lomas & Co.* to the petitioners; but if a balance had been struck at the date of the commission, showing the ultimate result of the transactions between the firm of *Henry Lomas & Co.* and the bankers, up to the 26th August 1815, which was the date of the bond, such balance would have amounted to 6195*l.*, being the aggregate of the said sums of 2375*l.* and 3820*l.*, with a small addition in respect of interest and commission. At the time of the bankruptcy, however, there was actually due from the bankrupts to *Watkins & Co.*, on the general balance of accounts, the

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sum of 28,802*l.*, which was reduced by bills subsequently paid to the amount of 27,552*l.*; and the money due on the bond, including interest, amounted to 10,341*l.*

On the 3d May 1816, *William Fidgeon*, the surety in the bond, died, possessed of considerable freehold and personal estate, leaving the bankrupt, *Thomas Fidgeon*, his personal representative.

On the 30th May 1816, the commission issued; and the petitioners proved against the joint estate a sum of 7421*l.*, and made a claim for the 10,000*l.* secured by the bond, and the sum of 10,000*l.* secured, or supposed to be secured, by transfer of an order for payment of a debt owing from *Alexander Levi & Co.* to the bankrupts, in case the respective securities should not satisfy the same, or the petitioners should thereafter be advised to prove against the bankrupts jointly, or against each of them separately.

On the 3d July 1816, the petitioners instituted a creditors' suit in the Court of Chancery against the personal representatives of *William Fidgeon*, and the assignees of the bankrupts, for the satisfaction of the bond for 10,000*l.*; in which, after the usual reference to the Master, the Master found by his report, that there was a sum of 12,913*l.* due to the plaintiffs from the intestate on the bond for principal and interest, and that they held the various bills of exchange mentioned in the schedule to the report, (and which were also specified in a schedule to the petition,) jointly with the bond, as securities for the balance due to them on the banking account. The assignees having excepted to the report, by an Order made on the 19th July 1822, on the hearing of the exceptions, it was ordered to be referred back to the Master to review his report, and to inquire whether the

bond was to be held as a security for the particular balance due to the plaintiffs on the banking account at the date of the bond, or for the general balance which should from time to time remain due to them; and if the Master should find that the bond was to be held only as a security for the particular balance due at the date of the bond, then he was to inquire whether any and what sum remained due to the plaintiffs from the estate of the intestate.

In pursuance of the last-mentioned order, the Master, on the 17th January 1825, made a further report, finding, that *William Fidgeon* was a surety only for the bankrupts; and that the bankrupts intended that the bond should be held by the plaintiffs as a security for the general balance which should from time to time remain due from them; and the Master presumed, that *William Fidgeon* considered the bond as given by him for the general balance, which might from time to time be due to the plaintiffs.

The assignees took two exceptions to this last report: 1st, that the Master ought not to have certified that the bankrupts intended that the bond should be held by the plaintiffs as a security for the general balance, which should from time to time remain due from them; and, 2dly, that the Master ought not to have certified that he presumed that *William Fidgeon* considered the bond as given by him for such general balance; but ought to have certified, that it was to be held as a security for the particular balance due to the plaintiffs on the banking account, at the date of the bond; and ought to have inquired, whether any and what sum remained due to the plaintiffs on the bond from the estate of *William Fidgeon*.

By an Order dated 12th December 1826, made by the

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Vice-Chancellor, on the hearing of these last-mentioned exceptions, the first of the exceptions was overruled, and the second was allowed. This Order was subsequently affirmed by the Lord Chancellor, and by the House of Lords.

In consequence of its having been decided by so much of this Order as allowed the second exception, that, as against the estate of *William Fidgeon*, the bond was to be held as a security for the particular balance due to the petitioners on the banking account at the date of the bond, and of the Court of Chancery having been of opinion, that such particular balance had been discharged; the bill of the petitioners was, by an Order, dated 1st May 1838, dismissed, so far as the same sought to establish their claim as specialty creditors of *William Fidgeon* upon the bond.

The petitioners stated, that they were advised, that by so much of the Order of the 12th December 1826, as overruled the first exception, it was conclusively decided that the bankrupts intended that the bond should be held by the petitioners as a security for the general balance, which should from time to time remain due to them. That several of the facts before stated were proved by the evidence taken in the Chancery suit, and especially by the evidence of two witnesses of the names of *Dyson* and *Wood*, who were since dead.

On the 11th October 1827, a renewed commission was issued against the bankrupts; and on the 4th January 1839, a renewed fiat was issued against them, under which the petitioners applied to prove the sum of 10,341*l.* against the separate estate of *Thomas Fidgeon*, for principal and interest due on the bond at the date of the commission; but the Commissioners rejected the proof,

on the ground that it was not made out by the evidence, that *Thomas Fidgeon* had agreed that the bond should be a security for the balance from time to time to become due to them from the firm of *Henry Lomas & Co.*

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Mr. *Swanston*, and Mr. *Goldsmid*, in support of the petition. There is a peculiarity in the form of the bond, in this case, by virtue of which the petitioners claim to prove against the separate estate of *Thomas Fidgeon*, namely, that the principal is payable on demand, while the interest is payable from the date of the bond. We say, that the bond was delivered as a security for any continuing balance, that might be from time to time due from the bankrupts to the petitioners, and was not merely a security for the then existing balance. The debt of 2375*l.* that was due at the date of the bond, was satisfied in August or September following. So that, unless the bond was to secure a running balance, the security would be perfectly useless. We propose to offer in evidence the proceedings in the suit in Chancery, and the depositions of those witnesses who are since dead.

Mr. *Whately*, and Mr. *J. Russell*, who appeared for the assignees, objected to the admissibility of this evidence, as the suit was not between the same parties.

Mr. *Bacon* stated, that he appeared on behalf of the separate creditors of *Thomas Fidgeon*, and that although they had not been served with the petition, yet he submitted, that they were entitled to appear by counsel to support their interests.

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The COURT, however, decided that he could not be heard; as the separate creditors had not been served with the petition.

Sir JOHN CROSS.—Upon the objection that has been taken to the proceedings in the Chancery suit being received in evidence, I am not quite prepared to give a decisive opinion. The admissibility of such proceedings will depend upon, whether in that suit the same question, and the same parties, were before the Court, as on this petition. Now, in that suit, the only question was, as to the liability of *William Fidgeon*, the surety; while here the question is, as to the liability of the estate of *Thomas Fidgeon*. It is therefore not the same question. Then, let us see, whether they are the same parties. The assignees are here to defend the interests of the bankrupt *Thomas Fidgeon*; but, as *Thomas Fidgeon* is the personal representative of *William Fidgeon*, and the assignees come here as the representatives of *Thomas Fidgeon*, there are the same parties before the Court, though mixed up in a different character.

Sir GEORGE ROSE.—According to the practice that prevails in Bankruptcy and Lunacy, I think the proceedings in the suit in Chancery are so far admissible, that the Court may look at them for its own information; but it is not bound by them. If you try the admissibility of documents, as evidence, in bankruptcy, by the strict rules that prevail in the courts of law, you will break down the whole superstructure of proceedings on petition in bankruptcy; for the very point of starting is the affidavit of the party.

The COURT then admitted the evidence, *de bene esse*.

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Mr. *Swanston* and Mr. *Goldsmid* then tendered in evidence the report of the Master in the suit in Chancery, the orders of the Vice Chancellor, the Lord Chancellor, and the House of Lords, and the depositions of the witnesses who were since dead.—When the case was before the House of Lords, on appeal from the judgment of the Lord Chancellor, although the House of Lords decided that, as against the *surety*, the bond must be taken as a security only for the balance actually due when it was executed, yet Lord *Lyndhurst*, in delivering his judgment on that occasion, took a very different view of the bond, as it affected the *bankrupts*. “It is said,” observes his Lordship, “that *Henry Lomas & Co.* deposited this bond, and intended it as a security for a future balance; and, in fact, the Master by his report has so found; and that report has been confirmed; and from the nature of the transaction it must have been so, because it would have been of no advantage whatever to Messrs. *Walker & Co.* to have had a security for a mere existing debt; since large advances were made from time to time, and large liabilities incurred on both sides. The amount of the existing debt would therefore be soon wiped off; and, as between *Henry Lomas & Co.* and the bankers, I have no doubt that it was intended as a security for any balance that might be found due between them. That is the ordinary nature of transactions between bankers and their customers.”

There is another circumstance, that is proper to mention to the Court, as it influenced the opinion of the Master in his report in the suit in Chancery, and it is

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this,—that the execution of the bond was originally attested by one witness, who happened to be a near relative of the parties; and it was thought prudent, therefore, to have it re-executed in the presence of another witness. This was not done until the following January; and as the balance due at the date of the bond was entirely paid off in the previous August or September, the Master inferred that it was the intention of the parties to secure a floating balance, and founded his judgment on this circumstance; but he was not supported in this view of the case by the Vice Chancellor. [Sir *George Rose*. The question is, whether, although as against the joint estate, you may be entitled to treat the bond as a security for a running balance, you are so entitled as against the separate partners, who are only sureties individually for the general balance that may be due from the joint estate.—Sir *John Cross*. Your argument will have this effect,—that the surety intended one thing and the principal another.] We admit, that the effect of the bond is to render the separate estate a security merely for the joint estate; and that the bond is not expressed to be a continuing security for a running balance; but it has been so dealt with by the parties; and if the meaning of the instrument is ambiguous, their subsequent acts will explain its meaning, and show their real intention. The Master's report having found, that there was a joint intention of the bankrupts that the bond should be held by the petitioners, as a security for the general balance that should from time to time be due to them from the bankrupts, there must necessarily have been a separate intention of each partner to the same effect. For, although there may be a joint and a separate liability, a man cannot have on

one occasion two different intentions. If he has one intention in his joint capacity, he must have the same intention in his individual character—he cannot have two minds upon the same occasion. The Master's report, as to the intention of the bankrupts in executing the bond, was confirmed by Sir *John Leach*, on the hearing of the exceptions to the report; and his decision was subsequently confirmed by the Lord Chancellor, and the House of Lords. But, independently of this decision, the conduct of the parties in their mutual dealings with each other, subsequent to the date of the bond, sufficiently explains the extent of the security intended by the bond; and there are numerous authorities to show that written agreements may be explained by parol evidence; as *Rex v. Laindon* (a), *Birch v. Depeyster* (b), and *Studdy v. Saunders* (c). The Court will not fail to notice, that the bond in this case is given by four persons jointly and severally, and that there is no distinction made, as to three of those persons being partners. So that if *William Fidgeon*, the surety, could be sued separately, each of the three other obligors must in like manner be sued separately; for the right of action cannot be joint against three, and separate against one; it must be either a joint action against the four, or a separate action against each of the obligors.

As to the claim for the interest; if the bond is good to secure the 10,000*l.*, although not due at the date of the bond, it is equally good for interest not then due. We submit, therefore, that the interest ought to be computed on the 10,000*l.* from the date of the bond; or, at least, that it shall be computed on the 10,000*l.*

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(a) 8 T. R. 379.

(b) 1 Stur. 210.

(c) 5 B. & C. 628.

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from the time that that sum was due. So that, if a period of five years had been suffered to elapse from the date of the bond, there would be 12,500*l.* due; that is, principal 10,000*l.*, and 2500*l.* for interest from the date of the bond.

Mr. *Whateley*, and Mr. *J. Russell*, for the assignees. There is no such ambiguity in the wording of the bond or condition in this case, as to admit the reception of any parol evidence to explain its meaning. Parol evidence may be given to explain an ambiguous term, or act, but not to add to their effect. We say, that the bond was given for a present debt owing from the bankrupts to the petitioners, at the date of the bond; and that that debt has since been paid. This view of the case was taken by Sir *John Leach* (a), when Vice Chancellor, in delivering his judgment on the hearing of the exceptions to the Master's report. His Honor thus expresses himself: "The first question here is, what is the legal effect of this bond; does the bond, at law, import an obligation for the payment of a present debt, or the payment of any floating balance that may accrue between the parties? There are two expressions, which are quite decisive upon the subject. In the first place, the bond is payable upon demand; that imports a present debt; because the demand might be made the day after the execution of the bond; and therefore it is clear, that this bond was for a present debt existing at the time of the execution of the bond; and there is no doubt that was the clear understanding of the Court, at the time when the reference was made; for, unless the Court had been of that opinion, by no

(a) See 11 Bligh, 266.

possibility could such a reference have been made to the Master. With respect to *William Fidgeon*, the surety, whose estate is sought to be charged by this suit, the Master expressly finds there is no evidence to import an intention on his part to this effect, except that he had re-executed the bond (which the Master finds) after the original execution of it; and the Master, from that circumstance, presumes that *William Fidgeon* had re-executed the bond, without inquiring whether, the debt was paid; considering that it should stand as a subsisting security for the general balance. When the evidence before the Master is considered, no such presumption arises out of the case; and the circumstance of the re-execution of the bond cannot have the effect of raising such a presumption; as the Master has concluded his report, by stating, "I am clearly of opinion, that, by the legal effect of the bond, it is a security for a present debt." Now, if the bond imported a present debt against one of the obligors, it imported a present debt against all. The House of Lords, then, having decided that it was given for a present debt, as against the surety, it must be for a present debt, as against the bankrupts, the three other obligors.

Mr. *Bacon*, who stated that he was now instructed also on the part of the assignees, contended that there was no evidence that *Thomas Fidgeon*, who was no less a surety than *William Fidgeon* for the joint estate, agreed that his separate estate should be charged as security for the joint estate. The reservation of interest from the date of the bond was irresistible evidence, that it was given for a present debt existing at the date of the bond.

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Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The question in the former case was, whether the bond was a security for a floating balance due from the bankrupts, as against the surety; and the House of Lords decided that it was not. The present question is, whether or not it was such a security, as against the principals. I will leave out of consideration all that passed in the former case, and will now look not only at the bond itself, but at the acts of the parties, to find the purpose for which the bond was deposited by the bankrupts with Messrs. *Walker & Co.* To ascertain this purpose, it is fair and reasonable to consider the parol evidence that explains the motives of the parties. It is true, the purpose did not appear on the face of the bond; but it may be ascertained from the circumstances existing when it was executed. Now, it is clear, from a consideration of all these circumstances, that the bond was not executed to secure a debt of 10,000*l.* then due to the petitioners; for no such sum as 10,000*l.* was then owing to them from the bankrupts. The only object, therefore, could be to secure a balance to that extent upon a running account. The account of *Lomas & Co.* with the bankers continued on the faith of the bond; and the subsequent advances made by the bankers were, no doubt, in reliance on that security. It has been since decided, that the surety was released, as he was no party to the subsequent proceedings. But, looking at the state of the accounts between the bankers and *Lomas & Co.*, and to their subsequent dealings, I am of opinion, that the bond was originally executed by the bankrupts, for the purpose of securing to the bankers the payment of any eventual balance; and that it was depo-

sited with them, to induce them to make further advances to the bankrupts. The petitioners are therefore entitled to prove, for the amount of the balance due to them, against the separate estate of *Thomas Fidgeon*.

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Sir GEORGE ROSE.—In considering the question on this petition, I am anxious to lay out of view what has passed in the Court of Chancery and the House of Lords. I think it must be taken for granted, that, as against the four obligors to the bond, there is no joint estate whatever. That will therefore let in a claim against the separate estate of each. It by no means follows, that the same principle, by which the liability of the surety would be governed, applies to the parties principally liable. Now, is there any fairer or more proper mode of construing the intentions of these parties, than from their continued mode of dealing with the bankers? In looking at the accounts which are annexed to this petition, and referred to in the body of it, I find nothing whatever to show, that the bond was considered to be paid off; and if the question was, with all the evidence now adduced before us, to go before a jury of merchants,—men of business, accustomed to deal with such subjects,—I think they would have little doubt as to the intention of the bankrupts in executing this bond, namely, to bind their separate estates for any eventual balance that might be due from them to the bankers, in respect of future advances. It appears to me, that in thus dealing with the intention of the parties, we shall construe that intention as consistent with the contract, instead of raising between them a contract *de novo*. Then, what would be the equitable effect of the intention of these parties in entering into this bond? If a Court of Law could not enforce the claim

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of the bankers for the balance due to them, there is no doubt that their claim could be supported in a Court of Equity; and I apprehend, that if the claim of the petitioners is consistent with principles of equity, it is equally good in bankruptcy. The Master has expressly found by his report, which finding was subsequently confirmed by the Court of Chancery and the House of Lords, that the bond was a good and subsisting bond at the time of the bankruptcy of *Henry Lomas & Co.*, and that it was the intention of the parties, when they entered into it, to secure any floating balance that might be due to *Walker & Co.*; and I perfectly agree with what has been urged to us from the bar, that the bankrupts could not have one intention in their joint character, and a different intention in their separate characters.

Proof allowed; costs of all parties out of the estate.

Ex parte LEONARD FOSBROOKE, Esq.—In the matter of
THOMAS FISHER, JOHN FISHER, and MARY SIMMONDS.

Westminster,
May 24,
June 8 & 12.

One of three assignees, who was also a creditor of the bankrupt, requested the Commissioners to tax the bills of the solicitor to the fiat, amounting to 2191*l.*; most of which the Commissioners de-

clined to tax, but professed to tax four of them, from which they took off only 17*s.* 2*d.*, at the suggestion of the solicitor; and then made an order on the assignees for payment of the amount.—*Held*, that the assignee was not estopped, by having joined his co-assignees in the payment of the bills, pursuant to the order of the Commissioners, from applying to the Court for an Order for taxation; and that he was entitled to such Order, as well in his character of assignee, as in that of a creditor, of the bankrupt.

Where one of several assignees presents a petition, he must either make his co-assignees parties, or serve them with the petition.

quested the Commissioners to tax five of the bills, amounting to 1033*l.* 14*s.* 7*d.*, which application was resisted by the solicitor, and was finally rejected by the Commissioners, on the ground that they did not consider it to be their duty to tax bills for general business, or for conveyancing. One of the other bills, however, amounting to 730*l.* 14*s.* 10*d.*, which related to the costs of the sale of an estate, the Commissioners did consent to tax, but taxed it at the whole amount, which they ordered the assignees to pay to the solicitor. On the 9th October 1838, which was the day appointed for auditing the accounts of the assignees, the petitioner applied to the Commissioners to tax three other of the bills; when the Commissioners told him, that if there were any improper charges in the bills, the solicitor, and not the assignees, would be liable to refund, and the Commissioners then positively refused to tax those three bills. But it appeared, that the Commissioners did tax four other bills at the respective sums which they respectively amounted to, with the exception of the sum of 17*s.* 2*d.*, which was taxed off one of them at the suggestion of the agent of the solicitor; and the amount of these four bills thus taxed the Commissioners were ordered to be paid to the solicitor. The petitioner alleged, that he had previously requested the solicitor to get all bills, relating to actions at law and suits in equity, taxed by the proper officers of the respective Courts, which he had neglected to do. The solicitor had consequently received the whole amount of the bills from the assignees.

Among the objectionable charges pointed out by the petitioner were the following.

Upon two several occasions 13*l.* and 7*l.* were charged for two meetings only of the Commissioners, which the

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petitioner alleged ought to have been only 9*l.* upon each occasion.

There were certain charges for stamps on deeds, which were contended to be improper; inasmuch as the deeds were exempted from stamp duty by the 6 *Geo.* 4. c. 16. s. 98.

Another charge was, for making ten copies of an abstract of title-deeds relating to the sale of an estate, containing 120 sheets, which were unnecessary; inasmuch as the solicitor had access to an existing abstract of the deeds, which might have been copied; and moreover the abstract included several deeds, which had no relation to the property; and the charge per sheet, containing only from three to five folios, was 6*s.* 8*d.* for drawing, and 3*s.* 4*d.* for copying, which was excessive and improper.

There was also a charge of 1*l.* 10*s.*, and 10*l.*, for drawing and making 20 copies of the conditions of sale, which were stated in the bill to extend to 30 folios; whereas they were comprised in 15 folios.

There were likewise various other charges for business done, which the petitioner contended was unnecessary.

The petitioner then alleged, that he was a creditor of the bankrupts to the amount of 300*l.* and upwards; and that he had applied to his co-assignees to join him in this petition, but they had declined to do so; that when the bills were paid to the solicitor, the petitioner did not feel satisfied with them; but he concurred in signing the cheques for the payment of them, in consequence of a statement made by one of the Commissioners, that although the bills were allowed by the Commissioners, they remained liable to be taxed by any creditor, on application to the Court of Review; and that the petitioner afterwards proceeded to examine the bills as soon as he conveniently could.

Mr. *Swanston*, and Mr. *Faber*, appeared in support of the petition.

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Mr. *Bethell*, *contra*, took a preliminary objection to the hearing of the petition; inasmuch as it was presented only by one of the assignees, and the other assignees had not been served with it.

Sir GEORGE ROSE.—The petition must in that case stand over. You must either make the assignees parties, or serve them with the petition.

Mr. *Swanston* stated, that the two other assignees had now been served with the petition; who said they did not choose to interfere; nevertheless they appeared by counsel, as respondents, in opposition to the petition. June 8.

Mr. *Bethell*, and Mr. *L. Wigram*, for the solicitor. June 12.
The petitioner in this case is a gentleman at the bar, and must therefore be taken to be perfectly conversant with his rights and duties. The bills in question were, 15 months before the audit meeting, put into the hands of the petitioner, who examined the bills, with a view to the audit; he deliberately included them in his account at the audit meeting, and afterwards deliberately settled them. In *Horlock v. Smith (a)*,—where, after a new solicitor was appointed, the bill of the former had been examined and paid by the latter, although the whole of the papers were not delivered over,—the Court, after a lapse of 15 months, and where no case of errors amounted to evidence of fraud, and there was no notice of any intention to dispute the charges, discharged an

(a) 2 Mylne & C. 495.

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order which had been obtained for the taxation of the bill. The amount of debts proved under this commission is upwards of 150,000*l.*, and 1*s.* 4*d.* in the pound has already been divided amongst the creditors. The taxation of these bills ought not to be lightly directed; for it will be attended with considerable expense to the estate, if a sixth be not taken off; and the petitioner has not alleged, that such is likely to be the case. The bills not only contain charges for various proceedings at law and in equity, relating to the estate of the bankrupts, but also charges for business relating to the mortgagee of the bankrupt's estate; which last are not to be considered as the charges of the solicitor to the fiat, but as deductions by the mortgagee from the proceeds of the sale of the mortgaged property. These charges ought, therefore, not to be included in the bill for taxation, but to be tested as a voucher. There is no precedent for one assignee applying to tax the solicitor's bills, after they have been paid, without the concurrence of the other assignees. You cannot apply to the case of a trustee, or a solicitor, any principle not applicable to a private individual. [Sir *John Cross*. The assignee in this case does not petition in his trust character, but in his private character as a creditor for 300*l.*] *Ex parte Walker* (a) decided that a creditor could not make such an application. [Sir *George Rose*. A creditor can, if the assignees refuse.] But only upon the ground of neglect of duty by the assignees. The 6 *Geo.* 4. c. 16. s. 114., directs, that all bills of fees or disbursements of any solicitor or attorney, employed under any commission for business done after the choice of assignees, shall be settled by the Commissioners, and the same so

(a) 1 G. & J. 95.

settled shall be paid by the assignees to such solicitor or attorney. The settlement of the costs, therefore, is entirely left to the discretion of the Commissioners; and the statute is imperative on the assignees to pay the bill, when the Commissioners have settled them. There is not a case to be found, where, after a party has had an opportunity of procuring a bill to be properly investigated, and has voluntarily paid it, that he has been permitted to have that bill taxed. Then, as to the petitioner being a creditor. The section just referred to does not contemplate a creditor who is an assignee, but one of the general body of creditors; for the assignees have the right to tax the solicitor's bill, independently of the provisions of that section. The object of that section, therefore, was to give parties a right to have the solicitor's bill taxed, who would not otherwise possess it. The settlement of the Commissioners is conclusive, unless there is some *suppressio veri*, or *suggestio falsi*, on the part of the solicitor. The case of *Horlock v. Smith*, already cited, was not so strong as this; for here there has been a settlement on legal investigation, while in that case there was payment, without any antecedent investigation. In *Waters v. Taylor (a)*, where there were no errors or improper charges amounting to fraud alleged or proved, on an application to tax a solicitor's bill, which had been some time previously settled by the client, the Lord Chancellor dismissed the petition with costs, observing that "a client is not, after payment, to have a taxation merely for asking for it." Has there been, either in Equity or Bankruptcy, any other principle recognized, on which a party is permitted to

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(a) 2 Mylne & C. 526.

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open an account that has been paid, except on the ground of fraud?

Mr. *J. Russell*, for the two other assignees. The petitioner's co-assignees have amply done their duty in the execution of their trust. Since the fiat was issued, in August 1835, a dividend of 13s. 4d. in the pound has been paid on debts to the amount of 150,000*l*. [*Sir George Rose*. Do you support or oppose the petition?] The co-assignees support their own acts, and oppose this petition, which, they contend, the petitioner is not entitled to present, unless he makes out a case of default against his co-assignees. He is here in no other character than that of assignee; for the gist of his right, as a creditor, to apply to tax the solicitor's bill, is, as a creditor *who has proved* under the fiat; and there is no allegation in the petition that he has proved his debt.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—This is a petition of a party, praying that twelve several bills of costs, which have been already paid to the solicitor by the assignees, may be taxed by the proper officer of the Court. There have been two objections raised to the petition: 1. that the petitioner has no *locus standi in curiâ*; 2. that he is estopped by his own acts from making any application to tax these bills. In support of the first objection, it has been argued, that the petitioner comes here as assignee, and that one assignee cannot present such a petition, without the concurrence of his co-assignees. But it is expressly alleged in the petition, that he is a creditor of the bankrupt's to the amount of 300*l*. He

therefore has a right to say that he comes here in the character of a creditor, and not in that of an assignee. I think, therefore, that he has clearly a *locus standi*. Then, as to the estoppel. The objection mainly applies to the 14th section of the act of parliament, which directs the assignees to pay the bills of costs, when they are settled by the Commissioners. Great stress has been laid on there being no case to be found, where a party has been permitted to have a bill taxed, when he has voluntarily paid it, and has had an opportunity of having it properly investigated. But it must be remembered, that the cases on this subject in the books apply to costs in Courts of Law and Equity. In law, if a man pays a bill, he is held to do it of his own accord; and he cannot afterwards dispute the items in it, except on the ground of fraud. But here the statute says, that the costs, when settled by the Commissioners, shall be paid by the assignees. They are therefore obliged to pay the bill. Then the Commissioners, at the audit meeting, declined to tax these bills, saying, "It is very unpleasant to tax solicitors' bills—you, the assignees, may safely pay the bills—you will not have to refund, in case of any overcharge, but the solicitor." In the judgment I am pronouncing in this case, I am far from inferring that the charges in these bills are not fair and proper; but I think, under all the circumstances, that there ought to be an order for the taxation of the bills; and I am sorry to perceive, that the other assignees have thought it necessary to oppose the prayer of this petition. I do not mean to find fault with them for doing what they conceive to be their duty; but it does seem to me rather extraordinary, that they should oppose the present application. So far from the bills being paid

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deliberately, as is said by the counsel for the solicitor, the very contrary appears to be the case. For what did he do? He went before the Commissioners at the meeting for the audit, for the purpose of having the bills taxed, when the Commissioners imperatively ordered him to pay them. This is the deliberate act of payment attributed to the petitioner. I think, therefore, that there is nothing in the objection that the bills have been already paid. Then, as to the bill for 730*l.* for costs, charged to the mortgagee of the bankrupt's estate. It is very true, that this is not directly a charge upon the assignees, but it is eventually so; and the Commissioners allowed it, without a farthing being taken off. That bill must therefore be included with the others in the order for taxation.

Sir GEORGE ROSE.—I am of opinion, that the petitioner comes here as a matter of right, in the character of a creditor,—and also, under the circumstances, in that of an assignee,—although he reluctantly deferred to the wishes of his colleagues in the payment of these bills. The solicitor to the fiat, I apprehend, is just as much a trustee for the bankrupt's estate as the assignees who employ him; and is equally liable to a strict investigation of his accounts. The only question will be, therefore, as to the effect of the taxation; but that we have at present no means of judging of. It is said, however, that the assignee is estopped from making this application, by having joined in the payment of the bills, after they had been settled by the Commissioners. But let us see how far he has thus precluded himself. There has been, in fact, no regular taxation; for the Commissioners *refused* to tax most of the bills; and from

those which they professed to tax they merely deducted 17s. 2d. at the suggestion of the agent for the solicitor. Then, as to the payment of the bills. The payment was in consequence of the provisions of an act of parliament, which rendered it imperative on the petitioner to pay them, after an order was made for that purpose by the Commissioners. The payment, therefore, was not the voluntary act of the assignee, but in obedience to the directions of the Commissioners; and it appears, moreover, that when he joined with the two other assignees in signing the draft on the bankers, he expressly stated that he acted and concurred with them in that proceeding, merely in pursuance of what the Commissioners had said. It is perfectly reasonable, therefore, that the bills should be taxed, and the Order is a matter of course.

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ORDERED as prayed.

Ex parte GEORGE FISHER.—In the matter of GEORGE FISHER and WILLIAM FISHER.

THIS was the petition of a solvent partner to annul the joint fiat, the petitioner undertaking to pay all the joint debts of the partnership.

It appeared, that the adjudication having been against *William Fisher* only, this petition, and the affidavits in support of it, were entitled "In the matter of *William Fisher*."

Sir GEORGE ROSE.—The petition and the affidavits are wrongly entitled. They ought to have been entitled "In the matter of *George Fisher* and *William*

Westminster,
June 11, 1839.

A joint fiat having issued against *A.* and *B.*, and *B.* only being proved a bankrupt, a petition was presented by *A.* to annul it, entitled "In the matter of *B.*:"
Semble, that the petition should have been entitled "In the matter of *A.* and *B.*"

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FISHER.

Fisher." No indictment for perjury would lie on either of these affidavits.

Sir JOHN CROSS.—Unless there is an inflexible rule of practice on the subject, it seems to me, that the error is not fatal, to entitle the affidavits in the matter of *William Fisher*; as he is the only party, who has been found a bankrupt.

Mr. *Bethell*, for the respondents, said there was no such fiat as one against *William Fisher*.

The COURT annulled the fiat, on the petition and affidavits being amended.

Mr. *Swanston*, and Mr. *Bacon*, appeared in support of the petition.

Ex parte JOSEPH RHODES.—In the matter of JOSEPH RHODES.

Westminster,
June 11, 1839.

On a petition of the bankrupt to annul the fiat, and stay the advertisement of the adjudication in the Gazette, the Court will not order the advertisement to be stayed, unless probable cause is shown that the bankrupt will succeed in his objections to the validity of the fiat.

THIS was a petition of the bankrupt to annul the fiat, and stay the advertisement of the adjudication in the Gazette; alleging, that he had committed no act of bankruptcy, and that there was no good petitioning creditor's debt; as the bills of exchange, on which it was founded, were not in his hands when he struck the docket.

Mr. *Swanston*, and Mr. *Rogers*, in support of the petition. The alleged act of bankruptcy in this case is founded on the 1 & 2 Vict. c. 110. s. 8., which enacts,

“that if any single creditor, or any two or more creditors, being partners, whose debts shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty’s Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions, which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice; provided a fiat in

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bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise." [Sir *George Rose*. Upon looking at the depositions before the Commissioners, nothing appears on the face of them, that would call upon this Court to supersede the fiat.] Mr. *Gibson*, the petitioning creditor, who makes the affidavit, swears that the bankrupt is indebted to him and *Joseph Taylor* and *William Taylor*, his late partners in trade, in the sum of 100*l.* and upwards, upon several bills of exchange, drawn by the deponent and his said late partners, upon and accepted by the bankrupt; and which have since become dishonoured and unpaid. Now, the debt here sworn to is not a debt due to a *single creditor*, or to two or more creditors, *being partners*; for the two other persons mentioned in this affidavit were not the partners of Mr. *Gibson*, when he made the affidavit, but his *late* partners, and are therefore not within the words of the act. [Sir *John Cross*. May not the words of the statute comprehend joint creditors?] The words of the statute are expressly confined to "two or more creditors being partners," when the amount of the debt shall be only 100*l.* But there is another objection to the act of bankruptcy. The filing of the affidavit of debt is proved by the solicitor who issued the fiat, and who, being entitled to be paid his costs out of the first funds received by the assignees from the bankrupt's estate, has therefore such an interest in upholding the fiat, as disqualifies him to be a witness to prove the act of bankruptcy. [Sir *John Cross*. The objection you now urge accrues *post litem motam*.] There is another defect in the affidavit. The statute requires, that the affidavit shall state that "the debt is justly

due" to the creditor. Now, the affidavit merely states, that the bankrupt "is justly and truly indebted" to the deponent and his late partners. [Sir *John Cross*. Does not that mean that the debt is justly due? The statute does not give a form.] There is, besides, a variance between the affidavit for the docket, and the deposition of the petitioning creditor on the proceedings; the former stating that the bankrupt is indebted "in the sum of 100*l.* and upwards, upon several bills of exchange;" while the deposition on the proceedings is for 100*l.* and upwards, "for goods sold and delivered." This does not therefore appear to be the same debt; nor does it appear that the debt mentioned in the affidavit for the docket was still owing at the time of the deposition.

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Mr. *Temple*, and Mr. *Bagshawe*, *contra*, were stopped by the Court.

Sir JOHN CROSS.—If the petitioner had shown by his counsel any probable cause that he could succeed on that part of his petition, which prays to annul the fiat, I should have been inclined to grant him an order for staying the advertisement of the adjudication in the Gazette; but it does not appear to me, that any such probable cause has been shown. Supposing the present act of bankruptcy to be bad, it is perfectly open to the petitioning creditor to prove a better act of bankruptcy, when called upon to do so before the Commissioners.

Sir GEORGE ROSE.—The act of bankruptcy relied on does not appear to me such as ought to have been put

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upon the proceedings; but still we should not be justified in granting an order to stay the advertisement in the Gazette. The Court will retain the petition; and the objections to the fiat, with a view to annulling it, may be discussed on a further hearing.

The ORDER was, that the further hearing of the petition should be adjourned; and that the costs of the respondents, occasioned by the present application, should be paid out of the estate, without prejudice to the question by whom the costs should ultimately be paid; which costs were to be taxed by the Commissioners; with liberty for either party to apply to the Court.

Ex parte WILLIAM GREEN.—In the matter of MATTHEW
ELGIE.

Serjeants' Inn
Hall,

July 10, 1839.

A party, having been committed for contempt, for disobedience to an Order of this Court, requiring him to pay certain costs awarded against him by a previous Order of the Lord Chancellor in this matter, petitions the Court of

Review for his discharge, on the following grounds:—1. That this Court had no jurisdiction to deal with any Order of the Lord Chancellor, as for a contempt; 2. That the affidavit in support of the petition, on which the order for commitment was obtained, was sworn before the petition was presented; 3. That the order of commitment, in the wording of it, appeared to have been made on the "intention" of the party applying for it, instead of on the petition of such party.—*Held*, that these were not sufficient objections to the validity of the commitment.

THIS was the petition of the bankrupt, praying that he might be discharged from his imprisonment in the Fleet prison, under an Order of the Court for his commitment made so far back as the 29th August 1833. This Order was made for a contempt, in not obeying the former Orders of the Court, dated respectively the 16th March 1833, and 31st July 1833, by which the petitioner was ordered to pay to the bankrupt two several sums of 36*l.* 7*s.* 8*d.* and 33*l.* 17*s.* 9*d.*; the first of these sums

being the amount of the taxed costs awarded against him on his petition to supersede the commission, which had been heard before the Vice-Chancellor and dismissed with costs; and the last-mentioned sum being the amount of the costs awarded against him on his petition of appeal to the Lord Chancellor, which was also dismissed, with costs.

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The objections taken in the petition to the Order and warrant of commitment were,

1. That the Court of Review had no jurisdiction to enforce the Orders of the Lord Chancellor, and Vice-Chancellor.

2. That the first Order of the Court of Review, of the 16th March 1833, for the payment of these two several sums, within fourteen days from the date of the Order, was bad; because the Orders of the Lord Chancellor and Vice-Chancellor were not served upon the petitioner, nor any demand made upon him for the payment of the costs.

3. That the second Order of the Court, of the 31st July 1833, being the peremptory Order for payment of the costs, within four days from the date of such last-mentioned Order, was bad; because the affidavit of *Morgan*, the party on whose affidavit the Order was obtained, was sworn previously to preferring the petition, viz. on the 25th July 1833, while the petition was not preferred until the 31st July 1833.

4. That the Order of Commitment of the 29th August 1833 was bad; inasmuch as no petition was previously presented for such Order, nor until the 3d September; before which day the petitioner had, in fact, been arrested on the warrant issued in consequence of such Order.

5. Because the affidavits of the bankrupt and *Morgan*,

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Ex parte

GREEN.

on which the Order of Commitment was grounded, were sworn respectively on the 19th and 21st August, which days were before the petition was preferred; and there was no evidence, therefore, that the costs were not paid on the 29th August.

6. Because the Order of Commitment is expressed to be made "on the *intention* of the said *Matthew Elgie*," instead of "on the *petition* of the said *Matthew Elgie*;" and the recital in the Order was therefore untrue and insensible.

The Order and warrant of commitment were as follows:

" In Bankruptcy. }
Court of Review. }

Thursday, the twenty-ninth day of August one thousand eight hundred and thirty-three.

In the matter of *Matthew Elgie*, a bankrupt.

Whereas the said *Matthew Elgie* did, on or about the nineteenth day of August instant, prefer his *intention* in the above matter to this Court, praying that *William Green*, in the said petition mentioned or described as of Mattersey, in the county of Nottingham, gentleman, might immediately stand committed to His Majesty's prison of the Fleet, for his contempt of the Order in the said petition mentioned or referred to; and that a warrant might issue under the seal of this Honorable Court for that purpose; and that the said *William Green* might be ordered to pay to the said petitioner, or to *Samuel Morgan*, his attorney therein mentioned, the costs of the said petitioner of and occasioned by that application: Now, upon reading the said petition, and the affidavits

of the said petitioner and of the said *Samuel Morgan* filed in support thereof, and also the former Order of this Court herein, bearing date the thirty-first day of July last; this Court doth order that the said *William Green* do stand committed to His Majesty's prison of the Fleet, for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose.

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By the Court."

" In Bankruptcy. }
Court of Review. }

In the matter of *Matthew Elgie*, a bankrupt.

Whereas by an Order made by this Court in the above matter, upon the petition of the said *Matthew Elgie*, bearing even date herewith, It was ordered that *William Green* therein named should stand committed to His Majesty's prison of the Fleet, for his contempt in the said petition mentioned or referred to, and that a warrant should forthwith issue for that purpose: These are therefore, in pursuance of the said Order, to will and require you forthwith, upon receipt hereof, to make diligent search after the body of the said *William Green*, and, wheresoever you shall find him, to arrest and apprehend him, and him safely convey to His Majesty's prison of the Fleet, there to remain until the further order of this Court; willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables, and all other His Majesty's loving subjects, to be aiding and assisting you in the due execution of the premises, as they tender His Majesty's service, and will answer the contrary thereof at their peril; and this shall be to you, and any of you,

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who shall do the same, a sufficient warrant. Dated the twenty-ninth day of August in the year of our Lord one thousand eight hundred and thirty-three.

By the Court,

J. Vizard, Dep. Reg^r. (L.S.)

To *William Robert Henry Brown*, Esquire,
Warden of His Majesty's prison of the
Fleet, or to his Deputy."

The petitioner, being brought up by the warden of the Fleet prison, appeared in person to support his petition. He stated, that although the commitment took place six years ago, he only discovered some of the above irregularities about two months since, and had proceeded in his present application to the Court as quickly as his unfortunate position allowed.

Sir JOHN CROSS.—It does not appear, that the petitioner has made any affidavit, stating that he is unable to pay either of the sums in question; and it may be doubtful, whether he can at this distance of time avail himself of the objections of form stated in his petition.

Mr. *Swanston* appeared, on behalf of the bankrupt, to oppose the discharge of the petitioner. The Order of the Court of the 29th August 1833, which is the record of the Court, recites that the petition was preferred before the date of the Order. It is not competent, therefore, for the petitioner now by his affidavit to contradict the record.

Sir GEORGE ROSE.—If the Order of Commitment, as alleged in the petition, was made on the 29th August

1833, and the petition for the Order was not preferred till the 3d September, which was five days afterwards, that is an unanswerable objection to the validity of this commitment. The reading of your Order of Commitment is not an answer to the affidavit of the fact.

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GREEN.

Sir JOHN CROSS.—The Order recites, that it was made upon a previous petition. The prisoner's affidavit states, that there was no previous petition. Which is the Court to believe, the affidavit, or the record? This is the first time I ever heard of an affidavit being permitted to contradict the record. In the time of Lord *Mansfield*, I remember a case occurred, where a party named in the record was therein stated to be living, and an affidavit was made alleging that he was dead at the time specified in the record; and, even in that case, Lord *Mansfield* would not admit an affidavit to contradict the record.

Mr. *Swanston*. The affidavit of the petitioner does not state, that the Order was drawn up before the petition for obtaining the Order was preferred. If there is no such allegation in the affidavit, I have nothing to answer. There is such an allegation in the petition, but no such statement in the affidavit in support of it.

The COURT sent for the Book of Petitions kept by the Registrar at the Bankrupt Office, in which there was an entry of a petition in this matter as having been preferred at or previous to the 29th August; and it appeared, that the petition itself was marked so at the office.

Sir JOHN CROSS.—There appears to be a clerical error

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in the entry in the Order Book, stating, that the petition was preferred on the 19th, instead of the 29th of August, and the same error has crept into the Order. This is all the mistake that I can find.

Sir GEORGE ROSE.—Look at the indorsement on the petition, which orders an attendance of the party. How can you support an Order of Commitment on a petition, upon which there is merely an order for attendance?

Sir JOHN CROSS.—Is the Order of Commitment of the 29th August bad, because there is an order for the attendance of the party on the same day?

Mr. *Swanston*. There is no doubt, that the petition for an Order of Commitment, after the default of the party in not obeying the four-day Order, is an *ex parte* application. That being the practice, there would be no necessity for any order for the attendance of the party on such a petition. The warrant of commitment is in conformity with the strict practice of the Court; and the only difficulty is the superfluous insertion in the Order of the 19th August, instead of the 29th August.

The petitioner then urged the other objections he had relied on in his petition; namely, that the affidavits in support of the petition for the Order of Commitment were sworn *before* the petition was presented; and that the same objection applied to the petition of the 31st July 1833 for the four-day Order; the only affidavit in support of that petition having been sworn on the 25th July. In *Ex parte Northwood (a)*, Lord *Eldon* de-

(a) 2 Rose, 246.

cided, that an affidavit sworn under such circumstances could not be read.

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GREEN.

Sir JOHN CROSS (after conferring with Mr. *Barber*, the Registrar,) said, the officer of the Court states the practice to be this: that although a party cannot file an affidavit, before presenting a petition, where there has been no previous proceeding in the matter in Court,—yet that, where there is a matter depending in Court, it is the constant practice to file affidavits, before a petition in the same matter is presented.

Mr. *Swanston* relied on this statement of the officer, and contended that the affidavits were perfectly regular, according to the practice of the Court; and that perjury might be assigned on these affidavits.

Sir JOHN CROSS.—I feel a difficulty in going into all the objections, which have been taken to the preliminary proceedings in this matter. Suppose a defendant in an action at law was, after judgment on a verdict in the action, imprisoned on a writ of *capias ad satisfaciendum*; could he come into Court and move to be discharged, because one of the jury at the trial was an interested party; or, because one of the witnesses examined at the trial was an incompetent witness; when he made no objection either to the juror, or the witness, at the trial, nor ever applied to the Court for a new trial, on the ground of either of these objections? So here, how can we try the regularity of affidavits filed in support of the petition of the 31st July 1833 for the four-day Order,—or the regularity of the previous Order of the 16th March 1833, which the petitioner contends is irregular, because the

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GREEN.

previous Orders of the Lord Chancellor and Vice-Chancellor were not served upon the petitioner?

The petitioner then took another objection to the affidavits—that they were entitled, “ In the Court of Bankruptcy,” instead of “ In the Court of Review.”

The COURT, however, were unanimous against the validity of this objection.

The petitioner then urged his objection to the jurisdiction of this Court to deal with the Orders of the Lord Chancellor and Vice-Chancellor, contending, that the Lord Chancellor was the sole judge of what was a contempt of his own Order.

Sir GEORGE ROSE.—The commitment, in the present case, is for a contempt in disobeying the Order of this Court. But the only advantage you could derive from these objections of form would be, to let in the facts.

The petitioner contended, that as the Lord Chancellor had made the Order for the dismissal with costs of his petition of appeal, since the establishment of this Court, the subsequent Orders to enforce the payment of such costs, and the Order of Commitment for the contempt in not paying them, should have been made by the Lord Chancellor; or the proceedings in the matter should have been duly transferred to this Court, pursuant to the requisitions of the act of parliament (a).

(a) See 1 & 2 Will. 4. c. 56. s. 39., and the General Rules and Orders for regulating the Practice of the Court of Bankruptcy, 1 Deac. & C. Append. XXIV. Rule vii.

Sir JOHN CROSS.—This Court has ample power, under the provisions of the 2nd section of the act, by authority of which it was constituted (*a*), to make any order for the enforcement of an order of the Lord Chancellor (*b*), in bankruptcy. The Order of Commitment in this case was for a contempt of process, not of the individual issuing the process, or making the Order. Besides, as has been already stated from the bench, there is a subsequent Order of the Court of Review recited in the Order of Commitment. So that there is nothing in this objection. There is not the slightest pretence for the discharge of the prisoner, on the merits. It is clear, that the money, for the non-payment of which he was committed, has been owing six years. It has never been suggested, that the money is not due; but the prisoner only alleges in his petition, that he has some larger demand against the bankrupt. The law must be obeyed; it has said, that these two sums, for costs, should be paid by Mr. *Green*. He does not deny his power to pay, but obstinately and contumaciously remains in prison, to avoid obedience to the law. The objections, though they have been urged with propriety, are mere points of form, and not in any way connected with the merits; some of them were totally unfounded, and others cannot be entertained. The Court, therefore, does not think there is sufficient ground to entitle the prisoner to his discharge.

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GREEN.

Petition dismissed, with costs.

(*a*) See 1 & 2 Will. 4. c. 56. s. 2.

(*b*) See *Ex parte Benson*, 1 Deac. & C. 324.

APPENDIX.

EXTRACTS FROM ACTS OF PARLIAMENT RELATING TO BANKRUPTCY.

Extract from 7 Will. 4. and 1 Vict. c. 73, intituled "An Act for better enabling Her Majesty to confer certain Powers and Immunities on Trading and other Companies."

Bankruptcy of any member or of a Company trading under the authority of the Act, not to affect the Company or the liabilities of the other members.

Sect. 25.—And be it enacted, that the Bankruptcy, Insolvency, or stopping payment of any officer or member of such Company or body in his individual capacity, shall not be construed to be the Bankruptcy, Insolvency, or stopping payment of such Company or body; and that the property and effects of such Company or body, and the persons, property, and effects of the individual members or other individual members thereof (as the case may be), shall, notwithstanding such Bankruptcy, Insolvency, or stopping payment, be liable to execution or diligence in the same manner, as if such Bankruptcy, Insolvency, or stopping payment had not taken place."

Extracts from 1 and 2 Vict. c. 110, intituled "An Act for Abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for Extending the Remedies of Creditors against the Property of Debtors; and for Amending the Laws for the Relief of Insolvent Debtors in England."

Manner of making a debtor a Bankrupt.

Sect. 8.—And be it enacted, that if any single creditor, or any two or more creditors, being partners, whose debts shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her

Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts: and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall hereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been, or may be, brought, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action; every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice; provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise.

Sec. 18.—And be it enacted, that all decrees and orders of Courts of Equity, and all Rules of Courts of Common Law, and all orders of the Lord Chancellor, or of the Court of Review in matters of Bankruptcy, and all orders of the Lord Chancellor in matters of Lunacy, whereby any sum of money, or any costs, charges, or expences, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such monies or costs, charges or expences, shall be payable, shall be deemed judgment creditors within the meaning of this act: and all powers hereby given to the judges of the superior Courts of Common Law, with respect to matters de-

Decrees and Orders of Courts of Equity and Court of Review to have the effect of judgments.

pending in the same courts, shall and may be exercised by Courts of Equity, with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of Bankruptcy, and by the Lord Chancellor in matters of Lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons, to whom any monies or costs, charges or expences, are by such Orders or Rules respectively directed to be paid.

No judgment,
&c. to affect
real estate
otherwise than
as before the
Act, until regis-
tered.

Sect. 19.—Provided always, and be it further enacted, that no judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in Bankruptcy or Lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or known last place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies, thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of 5s.; and all persons shall be at liberty to search the same book, on payment of the sum of 1s.

New writs may
be framed.

Sect. 20.—And be it enacted, that such new or altered writs shall be sued out of the Courts of Law, Equity, and Bankruptcy, as may by such Courts respectively be deemed necessary or expedient for giving effect to the provisions herein-before contained, and in such forms as the judges of such Courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circum-

stances of the case will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this Act, shall nevertheless be of the same force and virtue, as if no alteration had been made therein, except so far as the effect thereof may be carried by this Act.

Sect. 39.—And be it enacted, that the filing of the petition of every person in actual custody, who shall be subject to the laws concerning Bankrupts, and who shall apply by petition to the said Court for his discharge from custody, according to this Act, shall be accounted and adjudged an act of Bankruptcy from the time of filing such petition; and that any fiat in Bankruptcy issuing against such person, and under which he shall be declared Bankrupt before the time appointed by the said Court, and advertised in the London Gazette for such prisoner to be brought up to be dealt with according to this Act, or at any time within two calendar months from the time of making any such order as aforesaid, whether upon the petition of such prisoner, or the petition of any such creditor as aforesaid, shall have the effect of divesting the said real and personal estate and effects of such person out of the said provisional assignee: provided always, that the filing of such petition shall not be deemed an act of Bankruptcy, unless such person be so declared Bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid; but that every such order as aforesaid shall be good and valid, notwithstanding any fiat in Bankruptcy, under which such person shall be declared Bankrupt, after the time so advertised as aforesaid, and after the expiration of two calendar months as aforesaid.

Filing petition under the Act to be an act of Bankruptcy, if acted upon within a certain time.

Sect. 40.—Provided always, and be it enacted, that where the order vesting the estate and effects of any such prisoner in the provisional assignee of the said Court, in pursuance of the provisions of this Act, shall be or become void by reason of such prisoner being declared Bankrupt within such period as above mentioned, or being an uncertificated Bankrupt at the time of such order, the said order shall nevertheless, together with the petition of such prisoner, if any, remain of record in the said Court; and the said Court shall and may require such prisoner to file his schedule, and shall and may

Order to be filed, although avoided by Bankruptcy.

If prisoner obtains his certificate under fiat in Bankruptcy, the rights of assignees to be the same as in other cases.

Enactment not to affect title of assignees of Bankrupt, or operation of certificate.

cause such prisoner to be brought up to be dealt with according to this Act, and all things to be done thereupon or preparatory thereto, as in other cases according to this Act: and the said Court shall and may, at any time when it shall seem fit, appoint other assignee or assignees in such case and in the same manner as in other cases; and that, if at any time after such vesting order shall have been made, such prisoner shall obtain his certificate under any such Fiat in Bankruptcy, the rights, powers, title, and interest of the provisional assignee and other assignee or assignees appointed under this Act in, over, and respecting any property, real or personal, whatsoever, remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him, and under or in pursuance of any warrant of attorney to be executed by such prisoner under the provisions of this Act, shall, from and after the obtaining of such certificate, be the same as if the vesting order made under this Act had been made valid at the time of the making thereof: Provided always, that nothing herein contained shall be construed to affect the title, rights, and interest of the assignees under any such Fiat in Bankruptcy, or to alter or diminish the effect of any such certificate as aforesaid, but that the title, rights, and interest of such last-mentioned assignees, and the benefit of such certificate to such prisoner, shall be the same, to all intents and purposes, as if this Act had not been made.

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ACT OF BANKRUPTCY.

(*Departing the realm.*)

If a trader go abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means of paying bills of exchange, which fall due in his absence, he commits an act of bankruptcy. *Ex parte Kilner, re Bryant*, 3 Mont. & A. 722; S. C. 2 Dea. 324.

(*Denial to Creditors.*)

The act of bankruptcy consisted in J.'s having given directions, when in

embarrassed circumstances, that he should be denied to all persons; but there was no proof that he was in fact denied to any person, nor that he secreted himself. The jury found, that he began to keep his house, with intent to delay his creditors.—*Quære*, whether this was an act of bankruptcy. *Hare v. Waring*, 3 Mees. & W. 362.

Under 1 & 2 Vict. c. 110. s. 8.

An affidavit to support an act of bankruptcy, under the new act of 1 & 2 Vict. c. 110. s. 8., for the Abolition

of Arrest on Mesne Process, may be sworn before a Master Extraordinary in Chancery, and filed in the Register's Office of the Court of Bankruptcy. *Ex parte Hall, re Hall*, 3 Dea. 405.

An affidavit was filed against a trader, under the act for abolishing Arrest on Mesne Process, 1 & 2 Vict. c. 110. s. 8.; but, on account of some irregularity in the notice, the notice was withdrawn by the creditor. The Court refused to take the affidavit off the file, on the application of the trader; as the creditor was entitled, if he chose, to give a fresh notice. *Ex parte Gibson*, 3 Dea. 531.

(*Proof of, on a vivâ voce examination.*)

Where a *vivâ voce* examination is ordered, as to the act of bankruptcy, the assigness must give notice of what act of bankruptcy they rely on; but they are not bound to furnish a list of witnesses. *Ex parte Foster, re Foster*, 3 Dea. 175.

(*Relation to.*)

See RELATION—SHERIFF.

(*What amounts to notice of.*)

See NOTICE.

ACTIONS.

And see SET-OFF—SUIT IN EQUITY.

(*By and against the Bankrupt.*)

See BANKRUPT.

(*By Assignees.*)

The defendant, being in the employment of *J.* in his trade, sold, *bond fide*, some goods belonging to *J.*, after

J. had committed an act of bankruptcy, of which the defendant was ignorant. The sale was more than two months before the fiat issued. The defendant acted under a general authority. The assignee brought trover. *Held*, 1. On a plea of not guilty, that defendant, having sold under a general authority only, had been guilty of a conversion; and that if he had any justification, he should have pleaded it specially. 2. On an issue joined on a traverse of the assignee's possession, that the plaintiff must recover, no evidence having been given that the purchaser was ignorant of the bankruptcy; sections 81 and 82 of the 6 Geo. 4. c. 16. protecting the transfer, only, where the party dealing with the bankrupt is without notice; and the burthen of proof being here on the defendant, who affirmed the sale. *Pearson v. Graham*, 6 Adol. & E. 899.

A sheriff, who levies execution on the goods of a defendant, who becomes bankrupt on an act of bankruptcy committed before the execution, is liable in trover to the assignees of the bankrupt, notwithstanding he has no notice of the act of bankruptcy. *Garland v. Carlisle*, 4 Bing. N. C. 7; S. C. 3 Mees. & W. 152; 4 Scott, 587, in which last-mentioned reports the judgments are fully reported.

In trover by the assignees of a bankrupt, a plea that the plaintiff is not assignee puts in issue the petitioning creditor's debt, and the act of

bankruptcy. *Butler v. Hobson*, 4 Bing. N. C. 290; *S. C.* 5 Scott, 798.

In the same action, the defendant having succeeded on an issue that the plaintiff was not possessed of the goods as of his property as assignee, and it appearing that the plaintiff, as assignee under a second commission, had allowed the bankrupt to have the goods in his order and disposition:—*Held*, that the defendant was entitled also to the costs of evidence adduced to prove a third commission; but not to the expense of proving that the bankrupt's estate had, after certificate, produced 15*s.* in the pound under the second commission; upon which point issue had been raised. *Butler v. Hobson*, 5 Bing. N. C. 128; *S. C.* 5 Scott, 824.

A pawnbroker, who, in taking pledges, omits to pursue the course required by 39 & 40 *Geo.* 3. c. 99. s. 6, acquires no property in the pledges, and cannot maintain a lien on them in an action of trover by the assignees of the pawner, who afterwards becomes bankrupt. *Ferguson v. Norman*, 5 Bing. N. C. 76.

In trover by assignees of a bankrupt, a plea denying that they are such assignees puts in issue the petitioning creditor's debt and the act of bankruptcy. *Buckton v. Frost*, 1 Perry & D. 102.

To a declaration in trover by the assignees of a bankrupt, alleging a joint conversion by three defendants, two of them pleaded, that after the

bankruptcy, and more than two months before the issuing of the fiat, under which the plaintiff had been appointed assignee, and before the committing of the grievance, &c., the plaintiff, as assignee (to wit, by reason of the relation of his title as such assignee to the time of the bankruptcy), was the owner of and entitled to the goods in the declaration mentioned, as of his property as such assignee; and the bankrupt was then (subject only to such title of the plaintiff as aforesaid) possessed of and entitled to the said goods; and thereupon, after his bankruptcy and more than two months before the fiat, one of the defendants *bond fide* bought at a fair price from him the said goods; that the two defendants had no notice of the act of bankruptcy; whereupon the defendant, who had so purchased the goods, became possessed of them as of his own property; and that whilst he was so possessed, and at the said time when &c., in the declaration mentioned, he, in his own right, and the other defendant by his command, converted the said goods, which is the grievance in the declaration mentioned; without this, that at the time of the said conversion the goods were the property of the plaintiff, as assignee, or of right belonged to him as assignee; conclusion to the country. *Held*, on special demurrer, that the inducement in the plea amounted to a confession and avoidance, and that the subsequent traverse, therefore, made

the plea bad. *Pearson v. Rogers*, 1 Perry & D. 302.

In assumpsit by assignees of a bankrupt, *J.*, for the non-acceptance of shares in the Great Western Railway, which *J.*, before his bankruptcy, had contracted to sell to the defendant, and to convey to him at any time subsequent to the bankruptcy, the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant; the defendant pleaded, 1st, that *J.* committed no act of bankruptcy; 2ndly, that the act of bankruptcy, on which *J.* was declared a bankrupt, was unlawfully concerted between *J.* and the plaintiffs, and that he committed no other act of bankruptcy; 3rdly, that the plaintiffs were not proprietors of the shares; 4thly, that they did not tender certificates of them to the defendant.—*Seem*, that this was not a case where the depositions were conclusive evidence of the matters contained in them, under the 6 Geo. 4. c. 16. s. 92; inasmuch as the bankrupt could not have fulfilled his contract on the day specified, and therefore this was not a debt or demand, for which he could have sustained an action. But even if the case were within that section, *seem*, that evidence might be given to show that the act of bankruptcy was concerted. *Hare v. Waring*, 3 Mees. & W. 362.

In order to prove their proprietorship of the shares, the assignees

put in the transfer books kept by the Great Western Railway Company, under the Railway Act, 6 & 7 Will. 4. c. 107. s. 158., in which the assignees were entered as transferees. *Held*, that this was not sufficient evidence of their title. *Ibid*.

The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs, as original proprietors, nor had they any indorsement of transfer to them. *Held*, that such certificates were insufficient, inasmuch as they did not show a title in the plaintiffs to convey the shares under the act; (sections 147, 158). *Ibid*.

In an action by plaintiffs, as assignees of *O.*, a bankrupt, against defendant for non-performance of a contract, the issue raised was, whether *O.* and plaintiffs, as his assignees, had been always ready and willing to perform it. *Held*, that the bankruptcy and insolvency of *O.*, and the insufficiency of his assets, were circumstances from which the jury might properly infer, that he and his assignees had not been ready and willing. *Lawrence v. Knowles*, 5 Bing. N. C. 399.

The contract was to be performed on the 1st July 1835; and another issue was, whether plaintiffs had abandoned it. *Held*, that they were bound to make their election within a reasonable time, and that, as they had taken no decisive step till January 1838, the jury might properly

infer, that they had abandoned their contract. *Lawrence v. Knowles*, 5 Bing. N. C. 399.

(*Against Assignees.*)

A. demised a house and lands to *B.*, and afterwards, being embarrassed, assigned the premises and all his personal estate to *C.* *A.* told *B.*, that he had assigned the premises, and requested him to give *C.* an acknowledgment; whereupon *B.* gave *C.* a shilling, and subsequently agreed with *C.* to give up possession to him of the house and lands respectively, at the usual times, receiving an allowance for his improvements. Afterwards, and while the premises were still in *B.*'s occupation, *A.* became bankrupt, and *C.* brought ejectment. The assignees under *A.*'s commission defended as landlords, and contended that the assignment to *C.* was invalid, *A.* having become bankrupt when he made it. *Held*, that the acknowledgments above-mentioned did not estop *B.*, or the assignees as representing him, from contesting *C.*'s title, on the above ground; such acknowledgments having been made in consequence of *A.*'s representations, in which he suppressed the facts rendering the assignment invalid. *Doe dem. Plevin v. Brown*, 7 Adol. & E. 447.

ADJUDICATION.

And see REVERSING ADJUDICATION.

Quære, Whether the Commissioners are not bound to proceed to adjudication, upon a second or third fiat

issued against an uncertificated bankrupt. *Ex parte Addison, re Beard*, 3 Dea. 54.

ADVERTISEMENT.

On a petition of the bankrupt to annul the fiat, and stay the advertisement of the adjudication in the Gazette, the Court will not order the advertisement to be stayed, unless probable cause is shown that the bankrupt will succeed in his objections to the validity of the fiat. *Ex parte Rhodes, re Rhodes*, 3 Dea. 696.

AFFIDAVIT.

(*Amendment of.*)

The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. *Re Lees*, 3 Dea. 36.

(*Costs of.*)

After a petition is ordered to be dismissed with costs, because the petitioner declines to open it, the Court will not, on a subsequent day, entertain an application from him to exclude from the allowance of costs certain affidavits of the respondent, on the ground that they were filed too late to be read. If the affidavits are not filed in time, the petitioner should open his petition, in order to take the objection as to their disallowance. *Ex parte Sidebotham, re Clarke*, 3 Dea. 221.

Where a petitioner presents two petitions against the same party, involving the same point, and the respondent proposes that the decision in one shall bind in the other, the petitioner is not entitled to the costs of any affidavits filed by him in the second petition, after such proposal has been made. *Ex parte Scott, re Jones*, 3 Dea. 75.

(Filing.)

The mere circumstance of a petition being ordered to stand over, on the application of a party, does not prevent that party from filing fresh affidavits. *Ex parte Worthington, re Oulton*, 3 Dea. 332.

(Under 1 & 2 Vict. c. 110. s. 8.)

An affidavit to support an act of bankruptcy, under the new act of 1 & 2 Vict. c. 110. s. 8., for the Abolition of Arrest on Mesne Process, may be sworn before a Master Extraordinary in Chancery, and filed in the Register's Office of the Court of Bankruptcy. *Ex parte Hall, re Hall*, 3 Dea. 405.

An affidavit was filed against a trader, under the Act for abolishing Arrest on Mesne Process, 1 & 2 Vict. c. 110. s. 8., but on account of some irregularity in the notice, the notice was withdrawn by the creditor. The Court refused to take the affidavit off the file, on the application of the trader; as the creditor was entitled, if he chose, to give a fresh notice. *Ex parte Gibson*, 3 Dea. 531.

(Where it refers to Documents.)

Where an affidavit, in answer to a petition, referred to certain exhibits, which did not appear to be mutual accounts or documents between the parties, the Court refused an application of the petitioner to have copies of them furnished to him before the hearing of the petition. *Ex parte Purrr, re Purrr*, 3 Dea. 607.

(Evidence to contradict.)

An affidavit, stating the substance of what a witness deposed to before the Commissioners, is not admissible, for the purpose of contradicting his affidavit in support of his petition; but only with a view for the Court to decide, whether they will order the witness to be examined *viva voce*. *Ex parte Newall, re Newall*, 3 Dea. 333.

ALLOWANCE.

Where the Commissioner made an order, before the choice of assignees, for a certain allowance to be paid to the bankrupt, it was held no objection, that the memorandum of the order was signed after the choice. And when the assignees have agreed to make such allowance, they cannot afterwards withhold it, on the mere allegation that they have no funds in their hands. *Ex parte Stephenson, re Stephenson*, 3 Dea. 311.

AMENDMENT.

The Court will permit a mere verbal inaccuracy in the affidavit of the

petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. *Re Lees*, 3 Dea. 36.

ANNUITY.

A. grants an annuity to *C.*; and *B.*, as the surety of *A.*, jointly and severally covenants with *C.* to pay the annuity; provided that if default should be made in payment of the annuity by *A.*, *C.* would give notice in writing of so much of the annuity as might be in arrear, twenty-one days previous to the adoption of any measures against *B.* to enforce the payment of them. *B.* becomes bankrupt, before any default is made by *A.* in the payment of the annuity.—*Held*, that *C.* could not prove for the value of the annuity, under the provisions of the 6 Geo. 4. c. 16. s. 54. *Ex parte Marks, re Colnaghi*, 3 Dea. 133.

The bankrupt granted an annuity of 42*l.*, in consideration of 400*l.*, and received the whole of the consideration money, through the medium of the attorney employed by him in the transaction. Half an hour afterwards, at a different place, he repaid 100*l.* of this sum to the attorney, in discharge of a debt.—*Held*, that this was not a return, or retainer, of part of the consideration money, within the provisions of the annuity act; and that the value of the annuity was

proveable under the fiat. *Ex parte Bogue, re Basun*, 3 Dea. 314.

Where the bankrupt in a deed, by which he granted an annuity to the petitioner, acknowledged a certain sum to have been received by him, as the consideration money for the annuity; and, in a memorandum also of an account between him and the petitioner, admitted the same sum to be due; and the annuity was paid by him for ten years, without any impeachment of the consideration; the Court would not reject the right of the petitioner to prove, or claim, for the value of the annuity, because the bankrupt had made an affidavit that the whole of the consideration money, as stated in the memorial of the annuity, was not advanced by the petitioners to the bankrupts. *Ex parte Fairman, re Lloyd*, 3 Dea. 467.

ANNULING FIAT.

(On Applications by the Bankrupt.)

Although the bankrupt obtains a verdict in an action against his assignees disputing his bankruptcy, yet if the petitioning creditor is not a party to the action, it is not of course to annul the fiat. *Ex parte M'Intosh, re M'Intosh*, 3 Dea. 9.

A fiat may be annulled, with consent of all the creditors, before the 42nd day, if two meetings have been held for proof of debts. *Ex parte Foulkes, re Foulkes*, 3 Dea. 11. S. C. 3 Mont. 725.

On a petition to annul or reverse

the adjudication, the Court will look at the depositions on the proceedings, to see whether they are sufficient to support the fiat; if insufficient, and the petitioning creditor, or assignees, offer no further evidence, the fiat is annulled as of course; but if sufficient, the Court will give the bankrupt an opportunity to contravert the statements contained in the depositions. *Ex parte Field, re Field*, 3 Dea. 24.

To induce the Court to annul a fiat,—on the bankrupt's suggestion that the object of the petitioning creditor in issuing it was to dissolve a partnership subsisting between the bankrupt and other persons,—the Court must be quite satisfied, that that was the sole object of the petitioning creditor. *Ex parte Parkes, re Parkes*, 3 Dea. 31.

On a petition by the bankrupt to annul the fiat, for want of the proper requisites,—when the affidavits are diametrically opposite as to the facts, the Court will direct either a *vivâ voce* examination, or an issue; which, if taken by the bankrupt, will be under his liability to the costs. *Ex parte Bunn, re Bunn*, 3 Dea. 120.

The bankrupt concocted a fraudulent fiat, in concert with the petitioning creditor, upon a fictitious debt; but, three days before it issued, gave notice to the other parties, that he would go no further with the project; and, after it issued, petitioned to annul it:—*Held*, that, being *particeps criminis*, he had no *locus standi* to present a petition for that purpose.

Ex parte Nainby, re Nainby, 3 Dea. 121.

On a *bond fide* petition of the bankrupt to annul, the Court will let him see the proceedings, or order him to be provided with copies of the depositions; *aliter*, if the Court suspect it is not the petition of the bankrupt, but of a third party for a clandestine purpose. *Ex parte Foster, re Foster*, 3 Dea. 175.

It is of course to annul a fiat, with costs, for want of prosecution, on the application of the bankrupt; unless the petitioning creditor presents a petition for further time to open it. *Ex parte Jones, re Jones*, 3 Dea. 230.

If a creditor, who is a party to a deed of assignment of a trader's property for the benefit of his creditors, issues a fiat against him, it will be annulled with costs. *Ex parte Bunn, re Bunn*, 3 Dea. 119.

On a petition by the bankrupt to annul, for want of an act of bankruptcy, the respondent must prove the affirmative. *Ex parte Welden, re Welden*, 3 Dea. 240.

Any new depositions taken before the Commissioners, upon a reference back to them to review the adjudication, will be admissible in evidence to support the fiat. *Ibid.*

The circumstance of a petition having been presented to the Lord Chancellor to annul a fiat, is not a sufficient reason for the Court of Review declining to hear a petition on a collateral matter under the same fiat. *Ex parte Higgs, re Evans*, 3 Dea. 474.

A joint stock banking company,—during the pendency of a suit in equity brought by them against one of its members, for enforcing certain securities against him, and for an account,—proceed against him under the 1 & 2 Vict. c. 110. s. 8. (the Act for the Abolition of Arrest on Mesne Process), for the purpose of making him a bankrupt; their public officer swearing to a debt of 15,000*l.* being due from him, of which 9000*l.* was in dispute; they proceed to adjudication, and obtain from the Commissioners a provisional assignment to themselves; no other creditors appearing to prove, and no assignees being chosen under the fiat. The bankrupt having petitioned to annul the fiat, stating, that he was solvent, and that the Company had not given him credit for 9000*l.*:—*Held*, that the Court was bound, in the exercise of its equitable jurisdiction, to annul the fiat; as it appeared to have been sued out, not for the legitimate purposes of a fiat in bankruptcy, but to enforce the payment of a disputed partnership debt by an *ex parte* proceeding, during the pendency of a suit in equity; *dissent. Erskine, C. J. Ex parte Hall, re Hall, 3 Dea. 405.*

A solicitor may take out a fiat, as petitioning creditor, on the amount of his bill, before it is taxed; but, if after taxation it is reduced below 100*l.*, the fiat will be annulled. *Ex parte Ford, re Ford, 3 Dea. 494.*

Semble, that where the requisite ingredients to support the fiat are suf-

ficient on the face of the proceedings, and the bankrupt is furnished with copies of the depositions, and has notice that they will be read, on the hearing of his petition to annul the fiat,—the bankrupt is bound to offer some evidence in contradiction of the depositions, before the respondents can be called upon for evidence to confirm them. *Ibid.*

(*On Application of Petitioning Creditor.*)

A petitioning creditor, on finding that he has not a good debt, may petition to annul, before the expiration of the time for opening the fiat. *Ex parte Rogers, 3 Mont. & A. 506.*

(*On Applications of Creditors.*)

An order was made by the Lord Chancellor to annul a fiat,—because it was directed to other than the proper list of Commissioners, on an untrue affidavit,—without a petition, and on a statement made by the Commissioners. *Re Scott, 3 Mont. & A. 723.*

A. and *B.*, joint traders, on the 25th February, execute a deed of assignment to trustees for the benefit of their creditors. On the 25th March, a separate fiat issues against *A.*, and on the 10th August a joint fiat against *A.* and *B.* The trustees under the deed petition to annul the joint fiat, on the ground of *B.*'s infancy; but, it appearing that he was also an infant at the date of the trust deed:—*Held*, that the trustees had

no *locus standi*; and that even if they were legal creditors, they could not petition to annul the joint fiat, till they got rid of the previous separate fiat. *Ex parte Addison, re Beard*, 3 Dea. 54.

Quære, Whether a joint fiat is invalid, because one of the parties against whom it is issued is attainted of felony. *Ibid.*

A petition by a creditor to annul the fiat must state, not only that he was a creditor when the fiat issued, but that he is still a creditor. And where a creditor delayed three years before he made the application, the Court would grant no indulgence to such an informality. *Ex parte Sandall, re Clarke*, 3 Dea. 275.

A. issues a fiat against a trader; upon which *B.*, another creditor, proposes to him to abandon the fiat, and arrange the bankrupt's affairs by a trust deed for the equal benefit of all the creditors; to which proposal *A.* assents, and causes the trust deed to be prepared and tendered to *B.* for his signature. *B.* discovers that the deed gave *A.* an undue preference over the other creditors, and issues a second fiat.—*Held*, that he was justified in so doing; and a petition by *A.* to annul such second fiat was dismissed, with costs. *Ex parte Hallowell, re Bell*, 3 Dea. 278.

Semble, that a joint fiat may be annulled, as to one of the bankrupts, on the ground of infancy, and stand good as to the other, under the 6 Geo. 4. c. 16. s. 16. *Ex parte James*

Watson, re John Watson, 3 Dea. 277.

Where a fiat is sued out, for the sole purpose of defeating a judgment creditor, and procuring the bankrupt his certificate, the fiat will be annulled, notwithstanding the sufficiency of the usual requisites. *Ex parte Gaitskell, re King*, 8 Dea. 635.

(On Applications of Assignees.)

An assignee, who has a sufficient debt to support the fiat, ought not to petition to annul, for want of a good petitioning creditor's debt, without praying for a new fiat. *Ex parte Biggs, re Thomas*, 3 Mont. & A. 393.

Where one of two assignees petitioned to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt, but the other assignee was willing to prosecute it; the Court refused to annul the fiat,—as another petitioning creditor's debt might be substituted,—but permitted the petitioner to be discharged from the office of assignee, upon payment of costs. *Ex parte Booker, re Rawlins*, 3 Dea. 232.

An assignee, who had acted for more than two months under the fiat, but the proof of whose debt had been rejected by the Commissioner, applies to annul the fiat, for want of a good petitioning creditor's debt, contrary to the wishes of the other assignee and the other creditors. *Held* (on a petition for rehearing), that he was not in a situation to call on the Court, for this cause, to annul the fiat. *Ibid.* 346.

APPEAL.

Where a petition of appeal was presented to the Lord Chancellor, after one of the judges of the Court of Review had refused to certify a special case, on the ground that the question was one of fact, the petition was dismissed, with costs. *Ex parte Woodward, re Turner*, 3 Dea. 293.

After a petition for annulling the fiat has been heard and disposed of by the Court of Review, the Lord Chancellor can only interfere in his appellate, and not in his original, jurisdiction in bankruptcy; and an appeal, to remove the order on such a petition, must be brought before him by way of special case, unless he shall otherwise direct; which direction will only be given under very special circumstances. *Ex parte Stubbs, re Holt*, 3 Dea. 549.

No appeal lies to the Lord Chancellor against the settlement of a special case by a judge of the Court of Review, for refusing to introduce into the case a statement of certain facts, which the appellant contended ought to be inserted in it; the 1 & 2 Will. 4. c. 56. s. 3. 17. confining the right of appeal to matters of law or equity, or the refusal or admission of evidence, only; and the 3d section declaring, that the determination of the judge in the settlement of the case shall be final and conclusive. *Ibid.*

Lord Brougham's observations in *Ex parte Keys*, 1 Mont. & A. 242; 3 Dea. & C. 275; as to the Lord Chancellor's jurisdiction, in all matters

relating to the fiat, being wholly untouched by the provisions of the 1 & 2 Will. 4. c. 56., corrected. *Ibid.*

Although the 1 & 2 Will. 4. c. 56. s. 32. directs, that the decision of the Court of Review, on any appeal from the Commissioner on a question of proof, shall be final, unless an appeal to the Lord Chancellor is lodged within a month,—the Court of Review, under special circumstances, permitted a case of this description to be reheard, notwithstanding the petition for rehearing was not presented until six months after the former hearing. *Ex parte Jackson, re Warwick*, 3 Dea. 651.

APPRENTICES.

An articulated clerk to an attorney is not an apprentice, within the meaning of the 49th section of 6 Geo. 4. c. 16., and is therefore not entitled to a return of a reasonable portion of the premium, upon his master becoming bankrupt as a scrivener. *Ex parte Prideaux, re Bush*, 3 Mylne & C. 327; S. C. 3 Mont. & A. 516, overruling *Ex parte Fussell*, 2 Dea. 158.

APPROPRIATION.

A merchant abroad writes to B., his agent in England, a letter inclosing bills, in which he says: "the above bills are belonging to, and on account of, C., and I will thank you to dispose of the sums to him." Before the bills arrived, B. becomes bankrupt, and the bills come to the possession of the assignees.—*Held*,

that the direction in *A.*'s letter amounted to an appropriation of the bills, and that *C.* was entitled to claim them from the assignees. *Ex parte Cotterell, re Douglas*, 3 Dea. 12.

An agreement was entered into between a firm in England, and another in America, that the latter should purchase American bank shares, and remit them to the English house for sale, drawing bills on the English house for the amount of the purchase-money; and the proceeds of the sale of the shares were to be applied by the English house in payment of the bills. Various bills were drawn by the American on the English house, and were negotiated by the former. Both houses became bankrupt; and the certificates of the bank shares did not arrive in England until after the bankruptcy of the English house, where they got into possession of the assignees.—*Held*, that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills, and that the shares were not within the operation of the clause of reputed ownership. *Ex parte Brown, re Clagett*, 3 Dea. 91.

The defendants carried on business as a commission house at Liverpool, and were connected with several houses abroad, in which they were partners, but the foreign partners were not partners in the Liverpool house. *H.* and *J.* were in the habit of consigning goods to the defendants, to be sent abroad to their

foreign houses for sale, and the proceeds were remitted to the defendants on account of *H.* and *J.* *H.* and *J.*, being indebted to *R.* and *Co.*, wrote to the defendants, authorizing them to pay to *R.* and *Co.* one half of the remainder of these proceeds, after the defendants had paid themselves the balance due to them from *H.* and *J.*; on which the defendants wrote to *R.* and *Co.*, saying, they would pay the money accordingly on receiving their guarantee; which *R.* and *Co.* thereupon gave. Before the proceeds were received by the defendants, *H.* and *J.* became bankrupts, and their assignees gave the defendants notice not to pay any thing on account of the bankrupts.—*Held*, on the goods being afterwards received and sold by the defendants, that the proceeds were not recoverable by the assignees; as the letter of *H.* and *J.* contained a specific appropriation, or an equitable assignment to *R.* and *Co.*, which was not revocable by the bankrupts, or their assignees. *Hutchinson v. Heyworth*, 1 Perry & D. 266.

ARBITRATION.

At a meeting of creditors to decide on referring disputes to arbitration, and commencing suits in equity, a creditor may consent by proxy, under the 6 Geo. 4. c. 16. s. 88. *Ex parte Belcher, re Bannatyne*, 3 Dea. 98.

ARTICLED CLERK.

See APPRENTICE.

ASSIGNEES.

And see OFFICIAL ASSIGNEE.

(Choice of.)

Where one of several assignees is removed, being a lunatic, there must be a new choice. *Ex parte Rolls, re Fossick*, 3 Mont. & A. 702; *S. C.* 1 Deac. 618.

The bankrupt ought not to interfere in the choice of assignees; if he does, it seems they will be removed. *Ex parte Molineux, re Bright*, 3 Mont. & A. 703; *S. C.* 1 Dea. 603.

Where an assignee was chosen, without his authority, and declined to act, the costs of a new choice were ordered to come out of the estate. *Ex parte Pearson, re Stephenson*, 3 Dea. 324.

(To what Property entitled.)

Where the bankrupt had assigned a bond to a creditor, to secure the payment of a debt, with proviso for redemption, and the balance of the debt remaining unpaid at the time of his bankruptcy, was larger than the amount of the bond:—*Held*, that the bankrupt had no possibility of interest to pass to his assignees. *Dangerfield v. Thomas*, 1 Perry & D. 287.

Assignees of a bankrupt or an insolvent debtor take only such property as he was equitably, as well as legally, entitled to at the time of the bankruptcy or assignment. Therefore, if *A.* agree to assign to *B.* certain specific goods, by way of security for money advanced by *B.* for the

purchase of them; and afterwards, in pursuance of such agreement, actually assign them; although the assignment itself be under such circumstances as would have rendered it void under the Insolvent Debtors' Act, and *A.* subsequently takes the benefit of that act, his assignees are not entitled to such goods. *Secus*, if the agreement related to such goods, as *A.* might have at the time of the execution of the assignment, their *corpus* not being ascertained at the time of the agreement. *Mogg v. Baker*, 3 Mees. & W. 195.

The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

Special order made as to the disposal of the bankrupt's goods, which one assignee had taken in execution, and which the other assignee claimed as having been left in the reputed ownership of the bankrupt. *Ex parte Bishop, re Bird*, 3 Dea. 132.

An estate is conveyed to trustees, upon trust, to permit the same to be occupied and used by *G. G.* for life, and after his death by *T. G.*, for his life, with remainders over; and it was provided, that the person, who should be entitled to the use and occupancy of the mansion-house, should reside and dwell therein, and use the name and arms of *G.*, upon pain of forfeiting all benefit under the settlement. In 1819 *T. G.* becomes bankrupt, and shortly afterwards obtains

his certificate. At this time *G. G.*, the first tenant for life, was in possession of the property, and remained so till his death, in 1837; when *T. G.* entered on possession. — *Held*, that *T. G.* had such a life interest in remainder in this property, as passed to his assignee under his bankruptcy, liable to be defeated by the default of *T. G.* to comply with the conditions of the settlement; and that the Court would give its sanction to an agreement entered into between the bankrupt and assignees, by which a reasonable allowance was to be made to the bankrupt, to induce him to serve the estate, by continuing to reside in the mansion-house, and fulfilling the conditions of the settlement. *Ex parte Goldney, re Goldney*, 3 Dea. 570.

A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London, to be remitted to him from time to time. Under such an arrangement, the presumption is, until an agreement to the contrary is shown, that the London correspondent was not intended or entitled to treat the bills so remitted as cash, or to discount them before maturity. And therefore it was held,—the London correspondent having failed to pay his acceptances,—that two of such bills,

which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who had remitted them. *Jombart v. Woollett*, 2 Mylne & C. 389.

(Duties of.)

An assignee, who has a sufficient debt to support the fiat, ought not to petition to annul, for want of a good petitioning creditor's debt, without praying for a new fiat. *Ex parte Biggs, re Thomas*, 3 Mont. & A. 393.

(General Rights and Liability of.)

An official assignee may file a bill against the personal representatives of a deceased assignee, for an account, &c. of unclaimed dividends possessed by the deceased assignee; and the non-claiming creditors need not be parties to the suit. *Green v. Weston*, 3 Mont. & A. 414.

Where one of two assignees petitioned to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt, but the other assignee was willing to prosecute it; the Court refused to annul the fiat, as another petitioning creditor's debt might be substituted; but permitted the petitioner to be discharged from the office of assignee, upon payment of costs. *Ex parte Booker, re Rawlins*, 3 Dea. 232.

A dividend of 15s. was declared; but the assignee, thinking the estate would pay 20s. in the pound, paid a

creditor at that rate, and himself became bankrupt, and the creditor was chosen his assignee: — *Held*, the Court had jurisdiction to order him to refund the excess received. *Ex parte Grimwood, re Harvey*, 3 Mont. & A. 685; *S. C.* 1 Dea. 394.

Two of three assignees caused certain property of the bankrupt's to be sold, and executed a conveyance to the purchaser; but the third assignee declined to execute it, on the ground that the sale had taken place without his authority, and that he was not satisfied it was for the benefit of the estate. On a petition by the purchaser, for an Order on the third assignee to execute the deed, the Court refused such Order, without a previous reference to the Registrar, to inquire whether the sale was beneficial to the estate, and whether the conveyance was a fit and proper deed to be executed by the assignee. *Ex parte Underhill, re Bishton*, 3 Deac. 326.

An assignee, who had acted for more than two months under the fiat, but the proof of whose debt had been rejected by the Commissioner, applies to annul the fiat for want of a good petitioning creditor's debt, contrary to the wishes of the other assignee, and the other creditors. — *Held* (on a petition for re-hearing), that he was not in a situation to call on the Court, for this cause, to annul the fiat. *Ex parte Booter, re Rawlins*, 3 Dea. 346.

Where a mortgagee of certain lands,

which were held under leases for lives renewable for ever, had become bankrupt; and, an ejectment for non-payment of rent having been brought by the head landlord, and the premises redeemed by the assignees within the time allowed by the statute to mortgagees, who subsequently entered into possession by their agent: — *Held*, on a bill filed by an annuitant, claiming under a deed of settlement prior to the date of the mortgage, that the assignees were chargeable as mortgagees in possession, and were bound to appropriate the rents and profits of the lands which they had received, or without wilful default might have received, in discharge of the redemption money, in priority to that of their own mortgage. *Sloane v. Mahon*, 1 Drury & Walsh, 189.

One of three assignees, who was also a creditor of the bankrupt, requested the Commissioners to tax the bills of the solicitor to the fiat, amounting to 2191*l.*, most of which the Commissioners declined to tax, but professed to tax four of them, from which they took off only 17*s.* 2*d.*, at the suggestion of the solicitor, and then made an order on the assignees for payment of the amount. — *Held*, that the assignee was not estopped,—by having joined his co-assignees in the payment of the bills, pursuant to the order of the Commissioners,—from applying to the Court for an Order for taxation; and that he was entitled to such Order,

as well in his character of assignee, as in that of a creditor, of the bankrupt. *Ex parte Fosbrooke, re Fisher*, 3 Dea. 686.

Where one of several assignees presents a petition, he must either make his co-assignees parties, or serve them with the petition. *Ibid.*

(Actions by and against.)

See ACTIONS.

(Auditing their Accounts.)

See AUDIT.

ATTESTATION.

See PETITION.

ATTORNEY.

And see SOLICITOR.

The institution of a suit, under section 88 of the Bankrupt Act, 6 Geo. 4. c. 16, may be authorized by creditors present by attorney, as effectually as by creditors present in person. *Bannatyne v. Leader*, 3 Mylne & C. 579; S. C. *Ex parte Belcher*, 3 Mont. & A. 448.

AUDIT.

The Commissioners may appoint an audit meeting, though the six months mentioned in 6 Geo. 4. c. 16. s. 106. have elapsed. *Ex parte Holyland, re Elliott*, 3 Mont. & A. 684; S. C. 1 Dea. 367.

Charges for meetings of creditors, to determine whether or not the as-

signees should defend an action commenced against them, and charges for tavern expenses of bidders at a sale of the bankrupt's property, cannot be allowed in the assignees' accounts. *Ex parte Molineux, re Dennis*, 3 Mont. & A. 121; S. C. 2 Dea. 33.

BANKRUPT.

(Allowance to.) See ALLOWANCE.

(Protection from Arrest.)

If the bankrupt's last examination is adjourned *sine die*, and the Commissioner indorses no protection on his summons, the bankrupt is not protected from arrest, although he may (previously to being arrested) have obtained an appointment from the Commissioner for a day to finish his last examination. *Ex parte Bailey, re Bailey*, 3 Dea. 43.

Quære, whether the Commissioner has the power, after such an adjournment, to indorse a protection, on any subsequent attendance of the bankrupt. *Ibid.*

The Court will not interfere, on motion, to discharge a certificated bankrupt, who has been arrested and has given bail; *secus*, if in custody. *Summers v. Jones*, 3 Mont. & A. 460.

(Protection from Costs.)

The rule, protecting an uncertificated bankrupt from costs, applies only to petitions to annul the fiat. *Ex parte Bailey*, 3 Dea. 43.

(When entitled to Costs of Appearance.)

On a petition, under 6 Geo. 4. c. 16. s. 79., for appointing a new trustee, the bankrupt, if served, is entitled to the costs of his appearance. *Ex parte Whitley*, 3 Mont. & A. 696; S. C. 1 Dea. 478.

(Liability on New Promise.)

The promise by a bankrupt to pay a creditor a sum of money, if the creditor will come in and prove against the estate, is void. *Brealey v. Andrews*, 2 Nev. & P. 114; S. C. 7 Adol. & E. 108.

(Petition of, to annul.)

And see ANNULING FIAT.

The Court refused to supersede a commission issued twenty-six years ago, on the mere application of an uncertificated bankrupt; although 20s. in the pound had been paid to the creditors, and all the commissioners and assignees were dead. *Ex parte Ward, re Ward*, 3 Dea. 39.

On a petition by the bankrupt to annul the fiat, for want of the proper requisites, when the affidavits are diametrically opposite as to the facts, the Court will direct either a *voir dire* examination, or an issue; which, if taken by the bankrupt, will be under his liability to the costs. *Ex parte Bunn, re Bunn*, 3 Dea. 120.

The bankrupt concocted a fraudulent fiat, in concert with the petitioning creditor, upon a fictitious debt; but, three days before it issued, gave notice to the other parties that he

would go no further with the project, and, after it issued, petitioned to annul it.—*Held*, that, being *particeps criminis*, he had no *locus standi* to present a petition for that purpose. *Ex parte Nainby, re Nainby*, 3 Dea. 121.

(General Liability of.)

Where a tenant at a rent payable half yearly, against whom a fiat of bankruptcy issues during a current half year, delivers up possession of the premises to his landlord, according to 6 Geo. 4. c. 16. s. 75., he is not liable in assumpsit for his use and occupation, for the portion of the half year prior to the fiat. *Slack v. Sharp*, 3 Nev. & P. 390.

(When admissible as a Witness.)

A. and *B.* being in partnership, *A.* retires from the concern in favour of *C.*, who agrees to execute a bond to indemnify *A.* from the debt owing by *A.* and *B.* Subsequently, a separate fiat issues against *B.* On a suit instituted by *A.* against *C.* to compel a specific performance of his agreement, it was held, that the evidence of *B.*, who had not obtained his certificate, was not admissible to prove the agreement. *Warren v. Taylor*, 1 Cooper, 174.

(Commitment of.)

Where the bankrupt had been committed by the Commissioners for not answering satisfactorily, and was desirous of being examined before them

again, the Court, under the special circumstances of the case,—namely, that the bankrupt had been lying in prison twelve months, and was in a state of perfect destitution,—ordered him to be brought up at the expense of the estate. *Ex parte Crossley, re Crossley*, 3 Dea. 492.

There being reason to apprehend that a bankrupt, after the adjudication, was about to abscond to America, the Commissioners issued a summons against him, and on that summons, without any warrant, the messenger arrested him, and brought him before the Commissioners, when they proceeded to examine him, and put to him this question: "You having five months ago taken away 1500*l.*, and now accounting only for 600*l.* of it, what account do you now give of the rest?" To which the bankrupt having answered, "I can give no account;" the Commissioners committed him for answering unsatisfactorily. The Court, on the petition of the bankrupt, (*dubitante* Sir G. Rose,) ordered the Commissioners forthwith to discharge the bankrupt from custody. *Ex parte James, re James*, 3 Dea. 518.

(*Actions and Suits by and against.*)

To an action on a special contract to deliver bills with security in payment for books sold to the defendant under certain conditions of sale, the defendant pleaded three pleas, to the replication, to one of which he demurred and obtained judgment there-

on. The defendant afterwards became bankrupt, and the plaintiffs proved the amount of their debt under the fiat and declined to proceed with the action. The payment to the defendant of the costs of the demurrer had been stayed by a judge's order, until the trial of the issues joined between the parties.—*Held*, that the defendant was entitled to have those costs, or to take down the cause by proviso. *Whittaker v. Mason*, 4 Bing. N. C. 303.

A defendant, who is under terms to plead issuably, cannot plead the bankruptcy of one of the plaintiffs after the commencement of the action. *Staples v. Holdsworth*, 5 Scott, 432.

The Court refused to order a plaintiff to give security for costs, when he had become bankrupt after joinder in demurrer, and had obtained his certificate, the assignee declining to continue the action. *Beckham v. Knight*, 5 Scott, 336.

In assumpsit to recover a sum of money, defendant pleaded that plaintiff had been twice a bankrupt, and that he had not paid 15*s.* in the pound under the second commission.—*Held*, on special demurrer, to be a good plea; as the 6 *Geo.* 4. c. 16. s. 127. had divested his estate in the assignees absolutely, and did not leave him a right of action subject to their interference. *Young v. Riskworth*, 3 Nev. & P. 585.

To debt on bond, the defendant pleaded that a fiat of bankruptcy had

issued against the plaintiff, under which certain persons had been appointed his assignees, and that by reason of the premises they had become entitled to sue upon the bond. Replication, that by an indenture, reciting the plaintiff to be indebted to certain persons upon a cognovit in more than the amount of the bond, the plaintiff had assigned the bond to them as a further security, with a proviso for redemption; and that the balance of the debt remaining unpaid was larger than the amount of such bond, and that the action was brought for their benefit.—*Held*, on special demurrer, 1. That the plaintiff was not bound to make profert of the indenture; 2. That the replication was right, in setting out facts to show in what way the bond was prevented from vesting in the bankrupt's assignees, and that it was not bad for argumentativeness, in not traversing that the bond debt did vest in them; 3. That although the bond was stated to have been given only as a further security, and there was a proviso for redemption on payment of the debt, the bankrupt had no possibility of interest to pass to his assignees, as the balance of the unpaid debt exceeded the amount of the bond, and it did not appear that any other valuable security had been given. *Dungerfield v. Thomas*, 1 Perry & D. 287.

The assignees of a bankrupt having sold his estate, whilst he was proceeding to get his commission superseded, he filed a bill against them

and the purchaser and their respective solicitors, charging them with fraud and collusion in the sale, and alleging that he had settled with all his creditors, and that they had consented to the commission being superseded. A demurrer to the bill, on the ground that the plaintiff was an uncertificated bankrupt, was overruled. *Lantorn v. Holcombe*, 8 Sim. 76.

Declaration alleged, that before the making of the promise, &c. defendant was indebted to *J.* in 200*l.* for money had and received; that a commission of bankrupt had issued against defendant; that in consideration of the premises, and that *J.* would prove for the 200*l.* under the commission, defendant promised *J.* to pay him that sum in a few months; that *J.* proved, but that defendant did not pay. A verdict was given on this count for *J.*'s representative, but the judgment was arrested, on the ground that the count was founded on a promise without legal consideration; the Court refusing to presume that *J.*, in proving for money had and received, had waived a tort. *Brealey v. Andrew*, 7 Adol. & E. 108; S. C. 2 Nev. & P. 114.

BARRISTER.

A solicitor issuing a country fiat is bound to summon a barrister, who is one of the Commissioners named in it, although the solicitor may think him disqualified from acting as a Commissioner. *Ex parte Scott, re Shirley*, 3 Dea. 63.

Scoble, that two travelling fees cannot be taken by a Commissioner, for two meetings under different fiats, held on the same day and at the same place. *Ex parte Scott, re Shirley*, 3 Dea. 63.

BILLS AND NOTES.

(General Right of Proof on.)

Where a sum of money being due from *A.* to *B.*, *C.*, by *B.*'s request, and for his accommodation, drew a bill of exchange on *A.* for the amount, which *A.* accepted, and *C.* then indorsed the bill and gave it to *B.*, who indorsed and negotiated it; *B.* having subsequently become bankrupt, *Held*, that the amount of the bill, which was dishonoured, and paid by *C.*, was proveable by him under the fiat, and therefore that his right of action against *B.* was barred by the certificate. *Haigh v. Jackson*, 3 Mees. & W. 598.

It is no objection to the proof on a bill of exchange against the drawer, that the holder obtained it from the acceptor; if there is no suspicion of fraud. *Ex parte Gill, re Bates*, 3 Dea. 288.

On a petition to prove against the drawer, no evidence is required of his hand-writing, or of the notice of dishonour, where no objection was made on either of these grounds before the Commissioner. *Ibid*.

(When affected by the Statute of Limitations.)

A payment, by one of two joint

makers of a promissory note, of any interest due on the note, prevents the other joint maker from availing himself of the Statute of Limitations. *Ex parte Woodward, re Turner*, 3 Dea. 290.

A. and *B.* make a joint promissory note; ten years after the date of which, *B.* executes an assignment of his property, in trust for his creditors, under which a dividend is paid to the holder of the note; *A.* becomes bankrupt.—*Held*, that the payment of the dividend under *B.*'s assignment, being after the Statute of Limitations had already run, did not revive the debt, as against *A.*, so as to enable the holder to prove on the note, under the fiat against *A.* *Ex parte Woodward, re Turner*, 3 Dea. 294.

(Notice of Dishonour.)

Where the indorser of a bill becomes bankrupt before it falls due, notice of its dishonour, if occurring before the choice of assignees, must be given to the bankrupt,—if after such choice, to the assignees,—to enable the holder to prove. *Ex parte Chapple, re Gans*, 3 Dea. 218.

(When proveable against the Joint Estate.)

If a creditor draw a bill upon a firm, for his separate debt due from one partner, which is accepted by that partner in the name of the firm, the creditor cannot prove against the joint estate, without showing the as-

sent of the other partners to the firm being liable. *Ex parte Thorpe, re Wardley*, 3 M. & A. 716; S. C. 2 Dea. 16.

Where *A.* and *B.* carried on a partnership trade under their separate names, one residing at Manchester, and the other at London; it was held, that the holder of bills drawn by one partner upon the other, must elect, whether he would prove against the joint or separate estates; and that he was not concluded by a proof already made, and the receipt of a dividend under the separate estate; but, on refunding the dividend, might retire his proof from the separate estate, and prove against the joint. *Ex parte Law, re Bayley*, 3 Dea. 541.

(When affected by Usury.)

The petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period at the option of the bankrupt, but so as not to exceed the period of eighteen months in the whole; the bankrupt undertaking to pay 7½ per cent. interest, and 3*l.* per cent. for insurance. The note was renewed four times successively, and, on each renewal, the same rate was deducted for interest and insurance.—*Held*, that this transaction was not protected by the 3 & 4 Will. 4. c. 98. s. 7., which allows any interest to be taken on a bill or note not having more than three months to run, and was consequently usurious, and the note incapable of

proof. *Ex parte Terrewest, re Poynter*, 3 Dea. 590.

(Appropriation of before Bankruptcy.)

A merchant abroad writes to *B.*, his agent in England, a letter inclosing bills, in which he says, "the above bills are belonging to, and on account of, *C.*, and I will thank you to dispose of the sums to him." Before the bills arrive, *B.* becomes bankrupt, and the bills come to the possession of the assignees:—*Held*, that the direction in *A.*'s letter amounted to an appropriation of the bills, and that *C.* was entitled to claim them from the assignees. *Ex parte Cotterell, re Douglas*, 3 Dea. 12.

A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter, in respect of all such acceptances, should be covered by means of bills payable in London to be remitted to him from time to time. Under such an arrangement, the presumption is, until an agreement to the contrary is shewn, that the London correspondent was not intended or entitled to treat the bills so remitted, as cash, or to discount them before maturity. And therefore it was held,—the London correspondent having failed to pay his acceptances,—that two of such bills, which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass

to his assignees, but were the property of the party who had remitted them. *Jombart v. Woollett*, 2 Mylne & C. 389.

(*Right of Bill-holders.*)

An agreement was entered into between a firm in England, and another in America, that the latter should purchase American bank shares, and remit them to the English house for sale, drawing bills on the English house for the amount of the purchase-money; and the proceeds of the sale of the shares were to be applied by the English house in payment of the bills. Various bills were drawn by the American on the English house, and were negotiated by the former. Both houses became bankrupt, and the certificates of the bank shares did not arrive in England until after the bankruptcy of the English house, when they got into possession of the assignees.—*Held*, that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills, and that the shares were not within the operation of the clause of reputed ownership. *Ex parte Brown, re Clagett*, 3 Dea. 91.

(*Rights of Surety on.*)

A. accepted four bills for the accommodation of *B.*, which *B.* indorsed and deposited with his bankers, as a collateral security for his floating balance with them. *B.* became bankrupt; when the bankers proved

for a balance greatly exceeding the amount of the bills, excepting the bills, among others, as securities then held by them; and they afterwards received a dividend of 2*s.* in the pound on the amount of their proof. The bills were subsequently paid in full by *A.*—*Held*, that the bankers were not bound to refund to *A.* the dividend of 2*s.* on the amount of the bills; and that *A.* was only entitled to stand in their place, in respect of any future dividends on the bills. *Ex parte Holmes, re Garner*, 3 Dea. 662.

(*As to Merger of in a higher Security.*)

The bankrupts gave a joint and several promissory note for 2000*l.*, to secure advances made by their bankers; and when they were indebted to the bankers in 1957*l.*, one of the bankrupts mortgaged certain property to them, to secure that sum and all such further sums as might be advanced, to the extent of 3000*l.*, including the said sum of 1957*l.* At the time of the bankruptcy, the amount of the debt due to the bankers was 4365*l.*, of which they realized the 3000*l.* under the mortgage.—*Held*, (*Erskine, C. J. dissent.*) that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of their debt. *Ex parte Bate, re Bishton*, 3 Dea. 358.

BOND.

The Court will not stay the issuing

of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. *Re Lees*, 3 Dea. 36.

A., *B.*, and *C.*, partners in trade, together with *D.* as their surety, enter into a joint and several bond to certain bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but at the time of the bankruptcy of *A.*, *B.*, and *C.*, a much larger balance was due from them to the bankers, than the sum secured by the bond. *D.*, the surety, died; and in a creditor's suit brought by the bankers against his representatives, (to which suit the assignees of *A.*, *B.*, and *C.* were also parties) it was found, that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that should become due to them; but that the surety intended the bond to be a security, only, for the particular balance due to them at the date of the bond.—*Held*, that the bond was, under these circumstances, proveable by the bankers against the separate estate of *A.*, for the whole amount of the principal and interest secured by it. *Ex parte Walker, re Fidgeon*, 3 Dea. 672.

CERTIFICATE.

(*Petition to stay.*)

A petition to stay the bankrupt's certificate alleged, that the assignees procured a proof to be expunged, which ought to have remained on the proceedings, and permitted other proofs to remain, which ought to have been expunged; without stating that the debt expunged would have turned the certificate, or that the bankrupt was a party to the proceeding.—*Held*, not sufficient ground to stay the certificate. *Ex parte May, re Malachy*, 3 Dea. 382.

The petitioner also alleged, that if an account was taken between him and the bankrupt, a very large balance would be due to the petitioner, without stating the probable amount of such balance.—*Held*, also, that this was a defective allegation, on a petition to stay the certificate. *Ibid.*

If the petitioner seeks to *prove*, as well as *stay* the certificate,—or if the petition imputes any improper conduct against the assignees,—the petition ought to be served on the assignees. *Ibid.*

The Court refused to stay the bankrupt's certificate, where no misconduct was charged against him subsequent to the fiat; although the amount of the petitioner's debt could not be ascertained until the result of an inquiry, which had been directed before the Master (by an order of the Court of Chancery) in a pending suit brought by the petitioner against the

bankrupt; and notwithstanding the bankrupt was charged with misconduct previous to the bankruptcy, in causing unnecessary delay in the progress of the suit, and the taking the accounts before the Master. *Ex parte Stocken, re Stocken*, 3 Dea. 610.

The word "*witness*," prefixed to the name of the solicitor attesting the signature of the party presenting the petition, amounts to a sufficient attestation, within the meaning of the general order. *Ibid.*

Where a certificate is actually lying in the office for allowance, it is unnecessary to allege, in a petition to stay it, that it has been signed by the creditors or Commissioners. *Ibid.*

The Court will not stay the bankrupt's certificate, until the determination of an action brought by the petitioner against a third party, for the purpose of realizing a portion of his debt; where the petitioner did not appear to have used diligence in proving the remainder of his debt. *Ex parte Pheasant, re Sherwood*, 3 Dea. 625.

(*Allowance of.*)

A reference back to the Commissioners, to review a certificate, having been ordered,—and no report having been made by them, on account of their disagreeing as to their authority,—the certificate was allowed, with costs. *Ex parte Allday, re Allday*, 3 Mont. & A. 487.

(*Effect of Certificate under Second Fiat.*)

A certificate, under a second com-

mission, will not exempt the bankrupt's "future estate and effects" from the claim of his assignees to seize them, under 6 Geo. 4. c. 16. s. 127., unless the estate of the bankrupt, existing at the date of the certificate, shall have *actually produced* sufficient to pay 15s. in the pound. *Butler v. Hobson*, 5 Scott, 824.

The 6 Geo. 4. c. 16. s. 127. enacts, that where a person, who has obtained his certificate, shall again become bankrupt, and *have obtained*, or shall thereafter obtain, such certificate as aforesaid,—unless his estate shall produce sufficient to pay his creditors 15s. in the pound, his future effects shall vest in his assignees.—*Held*, that that enactment applies only to bankruptcies happening *after* the passing of the act. *Guthrie v. Boucher*, 8 Sim. 248.

CHARTER-PARTY.

See FREIGHT.

CHOICE OF ASSIGNEES.

See ASSIGNEES.

CLERKS.

See SERVANTS AND CLERKS.

COMMISSIONERS.

The Court will not discharge a Commissioner, named in a country fiat, from acting as a Commissioner, in order to be appointed solicitor to the fiat. *Ex parte Brinton, re Broom*, 3 Dea. 36.

The Court will not interfere with the discretion of the Commissioners, by directing them to sign a warrant for the apprehension of a bankrupt who has absconded. *Re Creed*, 3 Dea. 38.

Quere, whether the Commissioners are not bound to open and adjudicate, upon a second or third fiat issued against an uncertificated bankrupt. *Ex parte Addison, re Beard*, 3 Dea. 54.

A solicitor issuing a country fiat is bound to summon a barrister, who is one of the Commissioners named in it, although the solicitor may think him disqualified from acting as a Commissioner. *Ex parte Scott, re Shirley*, 3 Dea. 63.

Semble, that two travelling fees cannot be taken by a Commissioner, for two meetings under different fiats held on the same day, and at the same place. *Ibid*.

COMMITMENT.

Where costs are directed to be paid to *A.*, or his solicitor, a personal demand by *A.* alone is sufficient to ground an application for a committal of the party for the non-payment of them. *Re Diack*, 3 Dea. 53.

A party, having been committed for contempt,—for disobedience to an order of this Court, requiring him to pay certain costs awarded against him by a previous order of the Lord Chancellor in this matter,—petitions the Court of Review for his discharge, on the following grounds: 1st, that

this Court had no jurisdiction to deal with any order of the Lord Chancellor, as for a contempt; 2dly, that the affidavit in support of the petition, on which the order of commitment was obtained, was sworn *before* the petition was presented; 3dly, that the order of commitment, in the wording of it, appeared to have been made on the "*intention*" of the party applying for it, instead of on the *petition* of such party.—*Held*, that these were not sufficient objections to the validity of the commitment. *Ex parte Green, re Elgie*, 3 Dea. 700.

(Of Bankrupt.)

See BANKRUPT.

COMPOSITION CONTRACT.

The certificate of the Commissioners, under the composition contract clause, need not state that no creditor to the amount of 50*l.* resided out of England. *Ex parte Butterworth, re Butterworth*, 3 Dea. 395.

The bankrupt, and his surety, entered into an agreement with the assignees, to pay all the creditors 20*s.* in the pound, in consideration of which they agreed, that the fiat should be annulled. In pursuance of this agreement, 10*s.* in the pound was paid; and the assignees had a fund sufficient to pay the remainder, but were nevertheless proceeding to sell certain property of the bankrupt. On a petition by the bankrupt to restrain them from so doing, the Court declined to make any order; as the requisitions of the composition contract

clause had not been complied with. *Ex parte Nainby, re Nainby*, 3 Dea. 587.

COMPROMISE.

And see SANCTION OF COURT.

Order made, without a reference, confirming a compromise between a bankrupt and his assignees, by which the bankrupt agreed to abandon all further litigation, with respect to the validity of the commission, in consideration of a sum of money paid to him out of the estate, such compromise being approved by more than three-fourths in number, and five-sixths in value, of the creditors who had proved, and also a considerable body of creditors who had not proved, under the commission, and none of the creditors dissenting. *In re Chambers*, 1 Mylne & C. 509.

CONTRACT.

In an action by plaintiffs, as assignees of O., a bankrupt, against defendant, for non-performance of a contract, the issue raised was, whether O. and plaintiffs, as his assignees, had been always ready and willing to perform it.—*Held*, that the bankruptcy and insolvency of O., and the insufficiency of his assets, were circumstances from which the jury might properly infer, that he and his assignees had not been ready and willing. *Lawrence v. Knowles*, 5 Bing. N. C. 399.

The contract was to be performed on the 1st July 1835; and another

issue was, whether plaintiffs had abandoned it.—*Held*, that they were bound to make their election within a reasonable time, and that as they had taken no decisive step till January 1838, the jury might properly infer that they had abandoned their contract. *Ibid*.

COPIES OF DOCUMENTS.

Where an affidavit, in answer to a petition, referred to certain exhibits, which did not appear to be mutual accounts or documents between the parties, the Court refused an application of the petitioner to have copies of them furnished to him before the hearing of the petition. *Ex parte Parr, re Parr*, 3 Dea. 607.

COSTS.

(*Of Appearance on Petition.*)

On a petition, under 6 Geo. 4. c. 16. s. 79., for appointing a new trustee, the bankrupt, if served, is entitled to the costs of his appearance. *Ex parte Whitley*, 3 Mont. & A. 696; S. C. 1 Dea. 478.

(*Taxation of.*)

See TAXATION.

(*Of Affidavits and Evidence.*)

Where a petitioner presents two petitions against the same party, involving the same point, and the respondent proposes, that the decision in one shall bind in the other; the petitioner is not entitled to the costs

of any affidavits filed by him in the second petition after such proposal has been made. *Ex parte Scott, re Jones*, 3 Dea. 75.

After a petition is ordered to be dismissed with costs, because the petitioner declines to open it, the Court will not, on a subsequent day, entertain an application from him to exclude from the allowance of costs certain affidavits of the respondent, on the ground, that they were filed too late to be read. If the affidavits are not filed in time, the petitioner should open his petition, in order to take the objection as to their disallowance. *Ex parte Sidebotham, re Clarke*, 3 Dea. 221.

(Of Equitable Mortgagee.)

Where the leases of several houses were deposited, accompanied with a written memorandum, to secure a debt; and the creditor, eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other leasehold property as a substituted security, but without any fresh memorandum in writing:—*Held*, nevertheless, that the creditor was entitled to his costs. *Ex parte Cobham, re Halls*, 3 Dea. 609.

(Security for.)

Assignees may apply for security for costs of an inquiry, when the petitioner is insolvent. *Ex parte Molinoux, re Bright*, 3 Mont. & A. 705; S. C. 1 Dea. 603.

The Court refused to order the

plaintiff in an action to give security for costs, where he had become bankrupt after joinder in demurrer, and had obtained his certificate; the assignee declining to continue the actions. *Beckham v. Knight*, 5 Scott, 336.

(Lien for.)

The fund in Court being decreed to the assignees of a party, who in the course of the cause had become bankrupt, the solicitors employed by him during part of the proceedings have a lien for their costs. *Pounset v. Humphreys*, 1 Coop. 142.

Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of their lien. *Ibid*.

(In Actions by Assignees.)

In trover by the assignee of a bankrupt, defendant, having succeeded on an issue, that plaintiff was not possessed of the goods as of his property as assignee; and it appearing that the plaintiff, as assignee under a second commission, had allowed the bankrupt to have the goods in his order and disposition:—*Held*, that defendant was entitled, also, to the costs of evidence adduced to prove a third commission, but not to the expense of proving that the bankrupt's estate had, after certificate, produced 15s. in the pound under the second commission, upon which point an

issue had been raised. *Butler v. Hobson*, 5 Bing. N. C. 128.

(Bankrupt's Liability to.)

The rule, protecting an uncertificated bankrupt from costs, applies only to petitions to annul the fiat. *Ex parte Bailey*, 3 Dea. 43.

(Commitment for Non-payment of.)

Where costs are directed to be paid to *A.*, or his solicitor, a personal demand by *A.*, alone, is sufficient to ground an application for a committal of the party for non-payment of them. *Re Diack*, 3 Dea. 53.

CROPS GROWING.

See MORTGAGE.

DEPOSITIONS.

To assumpsit by assignees of *J.*, a bankrupt, for the non-acceptance of shares in a railway company, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day subsequent to the bankruptcy,—the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant,—the defendant pleaded, 1st, that *J.* committed no act of bankruptcy; 2dly, that the act of bankruptcy, on which he was declared a bankrupt, was unlawfully concerted between *J.* and the plaintiffs, and that he committed no other act of bankruptcy. *Semble*, that this was not a case, in which the depo-

sitions were conclusive evidence of the matters contained in them, under the 6 Geo. 4. c. 16. s. 92.; inasmuch as the bankrupt could not have fulfilled his contract on the day specified; and therefore this was not a debt or demand, for which he could have sustained an action. But even if the case were within that section, *semble*, that evidence might be given to show that the act of bankruptcy was concerted. *Hare v. Waring*, 3 Mees. & W. 362.

Any new depositions taken before the Commissioners, upon a reference back to them to review the adjudication, will be admissible in evidence to support the fiat. *Ex parte Welden*, *re Welden*, 3 Dea. 240.

DISMISSAL.

And see PETITION.

An order of dismissal cannot be drawn up, if the petition has not been filed in the office. *Ex parte Carnes*, *re Griffiths*, 3 Dea. 124.

The proper course is, in such case, to move to discharge the fiat at the foot of the petition, with costs. *Ibid.*

DISTRIBUTION OF ASSETS.

The Court of Review has no jurisdiction to order a fund in Court to be distributed amongst the creditors of a testator, to whose estate the fund belonged; the proper proceeding being by bill in equity for the distribution of assets; but the Court made a special order for the transfer of the fund to the Accountant-General of the

Court of Chancery, as soon as a bill should be filed by the creditors. *Ex parte Williams, re Knight*, 3 Dea. 378.

DIVIDENDS.

And see UNCLAIMED DIVIDENDS.

(*Must not be delayed.*)

If the solicitor to one of the parties to a petition, whose costs are ordered to be paid out of the estate, does not take in his bill in a reasonable time, the funds, regardless of the bill, must be divided amongst the creditors. *Ex parte Monk, re Burford*, 3 Mont. & A. 626.

(*Petition for Payment of.*)

On a petition for payment of a dividend, the order is of course, unless a cross petition is presented within a reasonable time. *Ex parte Lees, re Oulton*, 3 Dea. 287.

After the proof of a debt, but before the declaration of a dividend, the creditor received a large portion of the debt from a surety:—*Held*, that this did not prevent the creditor from receiving dividends on the whole amount of his proof. *Ex parte Copplestone, re Snell*, 3 Dea. 546.

A bankrupt agreed to pay his creditors in full, and gave bills for the amount, and the creditors executed a power of attorney to one *A. B.* to receive their dividends for the bankrupt's use; the bills not being paid, *Held*, that the creditors, and not *A. B.*, were entitled to the dividends; and that the dividends, on the issuing

of a second commission, were not in the reputed ownership of the bankrupt. *Ex parte Smither, re Govett*, 3 Mont. & A. 693; *S. C.* 1 Dea. 413.

DOCKET.

And see FIAT.

Where there are competing dockets, the Court will not interfere, unless the officer refuses to issue a fiat, or refers the parties to the Court. *Ex parte Thorp, re Lees*, 3 Mont. & A. 395.

Docket papers, describing the bankrupt as of the place where he actually traded at the time of striking it, are to be preferred. *Re Allday*, 3 Mont. & A. 485.

EAST INDIA COMPANY.

See PENSION.

EQUITABLE MORTGAGE

An equitable mortgagee is entitled to the rents only from the order of sale, notwithstanding he has previously given notice to the tenants not to pay them to the bankrupt. *Ex parte Burrell, re Norman*, 3 Dea. 76.

Although an order for the sale of an equitable mortgage is accompanied by an order of reference to the Commissioners, to ascertain the time of the deposit of the deeds, yet if the certificate of the Commissioners agrees with the statement of the equitable mortgagee, he is entitled to the rents accruing from the date of the order. *Ex parte Thorpe, re Teasdale*, 3 Dea. 85.

Where some deposits of deeds are made with written memoranda, and others without, the costs will be apportioned, and only those allowed which relate to the deposits accompanied with memoranda. *Ibid.*

Where there is no memorandum, the deposit of the deeds twelve years ago, and the bankrupt dead, the Court will not interfere to make the common equitable mortgage order. *Ex parte Jones, re Oliver*, 3 Mont. & A. 328.

Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before the order for sale. *Ex parte Scott, re Pearson*, 3 Dea. 304.

One of two partners deposits the deeds of his own estate, by way of equitable mortgage, to secure a partnership debt, and afterwards becomes bankrupt, the other partner being solvent:—*Held*, that an order may be made for the sale of the equitable mortgage, but no proof allowed against the bankrupt partner for the purpose of receiving dividends. *Ex parte Loyd, re Ireland and Harrison*, 3 Dea. 305.

There is no necessity for an order of the Court to sell an equitable mortgage, if all parties agree to the sale, without an order. *Ex parte Whitbread, re Lupton*, 3 Dea. 311.

On a petition of an equitable mortgagee for leave to bid, the Court will not excuse him from paying the deposit money, if he should become the

purchaser. *Ex parte Wilson, re Maltby*, 3 Dea. 505.

Where a legal mortgage was executed by the bankrupt, in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and it was consequently an unavailable security; it was held, that it did not operate as a merger of the equitable mortgage; and that the party was entitled to the usual order, as equitable mortgagee. *Ex parte Harcey, re Emery*, 3 Dea. 547.

Where the leases of several houses were deposited, accompanied with a written memorandum, to secure a debt; and the creditor, eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other leasehold property, as a substituted security, but without any fresh memorandum in writing:—*Held*, nevertheless, that the creditor was entitled to his costs. *Ex parte Cobham, re Halls*, 3 Dea. 609.

EVIDENCE.

And see WITNESS.

(*Depositions, &c.*)

In assumpsit by assignees of a bankrupt, *J.*, for the non-acceptance of shares in the Great Western Railway, which *J.*, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day subsequent to the bankruptcy,—the declaration averring that the plaintiffs were the proprietors of the

shares, and that they tendered certificates of them to the defendant—*Seemle*, that this was not a case where the depositions were conclusive evidence of the matters contained in them, under the 6 Geo. 4. c. 16. s. 92; inasmuch as the bankrupt could not have fulfilled his contract on the day specified, and therefore this was not a debt or demand, for which he could have sustained an action. But even if the case were within that section, *seemle*, that evidence might be given to show that the act of bankruptcy was concerted. *Hare v. Waring*, 3 Mees. & W. 362.

In order to prove their proprietorship of the shares, the plaintiffs put in the transfer books kept by the Great Western Railway Company, under the Railway Act, 6 & 7 Will. 4. c. 107. s. 158, in which the plaintiffs were entered as transferees. *Held*, that this was not sufficient evidence of their title. *Ibid.*

The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs, as original proprietors, nor had they any indorsement of transfer to them. *Held*, that such certificates were insufficient, inasmuch as they did not show a title in the plaintiffs to convey the shares under the act; (sections 147, 158). *Ibid.*

Any new depositions taken before the Commissioners, upon a reference back to them to review the adjudication, will be admissible in evidence to

support the fiat. *Ex parte Welden, re Welden*, 3 Dea. 240.

(Declarations of an Insolvent.)

Declarations of a person in insolvent circumstances, to show that he knew of his insolvency, are admissible in evidence, to prove such knowledge; provided the fact of his insolvency be proved *aliunde*. *Thomas v. Connell*, 4 Mees. & W. 267.

Seemle, that the fact of insolvency should be proved, before the declarations are offered in evidence. *Ibid.*

(Proceedings in another Suit.)

A., *B.*, and *C.*, partners in trade, together with *D.*, as their surety, enter into a joint and several bond to *E.* *D.* dies, leaving *A.* his personal representative, and a joint fiat issues against *A.*, *B.*, and *C.* *E.* institutes a creditor's suit in the Court of Chancery against *A.*, and the assignees under the fiat, as the personal representatives of *D.*; and afterwards petitions the Court of Review to prove the balance due on the bond against the separate estate of *A.*, which application is resisted by the assignees. *Seemle*, that the proceedings in the Chancery suit were admissible in evidence, on the hearing of this petition, the assignees being parties to both proceedings, and the subject-matter being the same; although the question in the suit was the liability of the surety, and the question on the petition the liability

of the principal debtor. *Ex parte Walker, re Fidgeon*, 3 Dea. 672.

(*What admissible to contradict.*)

An affidavit, stating the substance of what a witness deposed to before the Commissioners, is not admissible, for the purpose of contradicting his affidavit in support of a petition; but only with a view for the Court to decide, whether they will order the witness to be examined *viva voce*. *Ex parte Newall, re Newall*, 3 Dea. 333.

EXECUTION.

See SHERIFF.

EXECUTION CREDITOR.

A. levies an execution against *B.*, and while in possession of the goods the landlord distrains them for rent, which *A.* pays, to relieve the goods from the distress. *A.* becomes bankrupt, having committed an act of bankruptcy before the levy; by which *A.*'s execution is defeated, and the assignees possess themselves of the goods. *Held*, that the rent paid by *A.* to the landlord was so much money had and received by the assignees to their use. *Ex parte Elliott, re Jermy*, 3 Dea. 343.

A creditor having, before the bankruptcy of his debtor, taken him in execution, died shortly before the issuing of the fiat; and the bankrupt, eight months after the issuing of the fiat, obtained a judge's order for his discharge, on the ground that the action abated by the death of the

plaintiff; the plaintiff's executrix interfering in no way whatever to oppose the discharge. *Held*, that the discharge was not an extinguishment of the debt, and that the executrix could prove the amount of it under the fiat. *Ex parte Goodman, re Nainby*, 3 Dea. 631.

EXPUNGING PROOF.

See PROOF.

FACTOR.

See PRINCIPAL AND AGENT.

FELONY.

Quære, Whether a joint fiat is invalid, because one of the parties, against whom it is issued, is attainted of felony. *Ex parte Addison, re Beard*, 3 Dea. 54.

FIAT.

And see DOCKET—PETITIONING CREDITOR.

(*Issuing—Competition between Creditors.*)

A. issues a fiat against a trader; upon which *B.*, another creditor, proposes to him to abandon the fiat and arrange the bankrupt's affairs by a trust deed for the equal benefit of all the creditors; to which proposal *A.* assents, and causes the trust deed to be prepared, and tendered to *B.* for his signature. *B.* discovers that the deed gave *A.* an undue preference over the other creditors, and issues another fiat. *Held*, that he was justified in so doing; and a petition by

A. to annul that fiat was dismissed with costs. *Ex parte Hallowell, re Bell*, 3 Dea. 278.

Where a creditor, two days after the time had expired for opening a country fiat, struck another docket; but it appearing afterwards that the fiat had been opened on the twenty-eighth day, the office declined to issue a fiat on this second docket, and the creditor afterwards applied to the Court; his application was dismissed, and would have been dismissed with costs, if he had had notice of the previous adjudication, when he struck the docket. *Re Wood*, 3 Dea. 514.

The petitioning creditor issued a fiat on the 20th December 1837, but forbore to prosecute it, in order to enable the bankrupt, who had some disputes pending with his partner, to settle them by arbitration. The award was not made till the 14th February 1839, when the petitioning creditor applied for leave to issue another fiat; but the application was refused both by the Court of Review, and the Lord Chancellor. *Ex parte Foljambe, re Hewitt*, 3 Dea. 628.

After a joint fiat was issued against *A.* and *B.*, *A.* died, upon which the same petitioning creditor, two days after *A.*'s death, applied at the office, with fresh docket papers, for a separate fiat against *B.*, but found that another creditor had previously lodged other docket papers for such separate fiat. *Held*, that the petitioning creditor under the joint fiat,

was, under these circumstances, entitled to the preference. *Re Norris*, 3 Dea. 643.

(Against a Country Trader.)

All country fiats must be directed to the list in the county nearest to the place of residence of the bankrupt, unless a special Order be obtained on affidavit, directing the fiat to go to any other list. *General Order*, 3 Dea. 549.

A London fiat was issued against a country trader, where otherwise the property would have been carried off. *Ex parte Booth, re Hayes*, 3 Mont. & A. 627.

A London fiat was also issued against a trader residing at Oxford, for the convenience of getting in the debts, the petitioning creditor paying the bankrupt's expenses of coming up to London. *Ex parte Trowers, re Margetts*, 3 Mont. & A. 484.

A town fiat was ordered to be issued, instead of a country fiat, on the ground that twenty-eight out of thirty creditors resided in London; and the petitioning creditor was permitted to recoup himself the additional expenses of the bankrupt's attendance out of the estate. *Re Gregg*, 3 Dea. 381.

But the Court will not order the fiat to be directed to a London Commissioner, instead of country Commissioners, merely because a majority of the creditors reside in London. *Ex parte Rawlinson, re Jones*, 3 Dea. 535.

The Court refused to allow a fiat to be directed to the place, where the bankrupt had formerly resided and traded for three years up to the 15th June 1837, and where he had become largely indebted to persons also residing there; notwithstanding he had since that period had no permanent place of abode, but had resided only for a few months together in five different and distinct parts of the kingdom. *Re Hewitt*, 3 Dea. 586.

(*Second and third Fiat.*)

Quære, Whether the Commissioners are not bound to open and adjudicate upon a second or third fiat, issued against an uncertificated bankrupt. *Ex parte Addison, re Beard*, 3 Dea. 54.

The 127th section of 6 Geo. 4. c. 16., which vests in the assignees all the future estate and effects of a bankrupt, who does not pay 15s. in the pound under his second commission, is retrospective. *Young v. Riskworth*, 3 Nev. & P. 585.

In assumpsit to recover a sum of money, defendant pleaded that plaintiff had been twice a bankrupt, and that he had not paid 15s. in the pound under the second commission. *Held*, on special demurrer, to be a good plea; as the 6 Geo. 4. c. 16. s. 127., had divested his estate in his assignees absolutely, and did not leave him a right of action, subject to their interference. *Ibid.*

A fiat issued against a trader, who

had already been twice bankrupt, and obtained his certificate on both occasions; but whose estate had not produced 15s. in the pound under the second commission. The bankrupt had, between the time of obtaining his certificate under the second commission, and the issuing of the fiat, carried on business to a considerable extent, and was possessed of property, which might at any time have been made available, in satisfaction of the debts proved under the second commission; and the assignee under that commission was aware of these facts. *Held*, that, under these circumstances, the fiat was not void; such after-acquired property having been suffered to remain in the possession of the bankrupt, as reputed owner, and therefore being such as, by virtue of the 6 Geo. 4. c. 16. s. 72., the fiat might operate upon. *Butler v. Hobson*, 5 Scott, 824.

As to the validity of a third fiat, where 15s. in the pound has not been paid under a second commission or fiat. *Summers v. Jones*, 3 Mont. & A. 400.

(*Annuling.*)

See ANNULING FIAT.

(*Joint Fiat.*)

Quære, Whether a joint fiat is invalid, because one of the parties against whom it is issued is attainted of felony. *Ex parte Addison, re Beard*, 3 Dea. 54.

Special order made for incorpo-

rating the proceedings under two previous separate fiats, with those under a subsequent joint fiat; where assignees had been chosen, and a dividend declared under the separate fiats. *Ex parte Lister, re Haddon*, 3 Dea. 516.

(Renewed Fiat.)

Where a renewed commission issued in 1816, under which two of the Commissioners were dead, and two had removed to distances of 100 miles and 80 miles, the Court ordered it to be superseded, and the proceedings under it to be transferred to a renewed fiat. *Ex parte Higgs, re Evans*, 3 Dea. 474.

(Staying.)

The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. *Re Lees*, 3 Dea. 36.

FIERI FACIAS.

See SHERIFF.

FRAUDULENT CONVEYANCE.

See VOLUNTARY CONVEYANCE.

FRAUDULENT PREFERENCE.

The defendants, holding (as security for a debt due to them from *D.*) a policy of assurance effected by *D.*, refused to join in a composition deed, by which *D.* was to be released from his debts on paying 8s. in the pound,

unless *D.* assigned the policy to them. *D.* assigned it, and defendants then executed the composition deed.—*Held*, that such assignment was a fraud; and, *D.* having become bankrupt, that his assignees were entitled to recover from the defendants the money they had received on the policy, notwithstanding the 8s. in the pound was never paid. *Alsager v. Spalding*, 4 Bing. N. C. 407.

FREIGHT.

A., a broker, on behalf of the owner of a ship, entered into a charter-party with *B.*, by which *B.* agreed to pay to *A.*, on behalf of the owner, a certain sum for the freight of the ship. The owner assigned the freight and earnings that might become due under the charter-party to *C.*, as a security for a debt; and *C.* gave notice of the assignment to *A.*, but not to *B.* The vessel completed her voyage, and afterwards the owner became bankrupt.—*Held*, that the money due on the charter-party was not in his order and disposition, at his bankruptcy. *Gardner v. Lacklan*, 8 Sim. 123.

FRIENDLY SOCIETY.

On the appointment of the bankrupt as treasurer of a friendly society, it was agreed, that of the funds then in hand she was to pay interest for 120*l.*:—*Held*, that this was not to be considered as a loan to her; but that it was in her hands and possession by virtue of her office of treasurer, within the meaning of the 4 & 5 *Will.*

4. c. 40. s. 12., and that the assignees were bound to pay over the amount to the society. *Ex parte Ray, re Woodliffe*, 3 Dea. 537.

GENERAL ORDER.

As to the direction of fiats. 8 Dea. 549.

GUARANTEE.

Where a debt having been partly guaranteed, the debtor becomes bankrupt, and the creditor proves for a larger amount than that covered by the guarantee, the dividends must be applied, in case of the guarantor, rateably to the whole debt proved. *Raikes v. Todd*, 1 Perry & D. 138.

HABEAS CORPUS.

Whether issuable by the Court of Review. See note to *Ex parte James*, 3 Dea. 528.

HOTEL-KEEPER.

See REPUTED OWNERSHIP.

INFANCY.

A. and *B.*, joint traders, on the 25th February execute a deed of assignment to trustees for the benefit of their creditors. On the 25th March a separate fiat issues against *A.*, and on the 10th August a joint fiat against *A.* and *B.* The trustees under the deed petition to annul the joint fiat, on the ground of *B.*'s infancy; but, it appearing that he was also an infant at the date of the trust deed:—*Held*, that the trustees had no *locus*

standi; and that even if they were legal creditors, they could not petition to annul the joint fiat, till they got rid of the previous separate fiat. *Ex parte Addison, re Herbert*, 3 Dea. 54.

INSOLVENT.

Goods allowed to be in the order and disposition of a bankrupt, as reputed owner, by the consent of his assignee, are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors' Court. *Butler v. Hobson*, 4 Bing. N. C. 290.

To a plea of discharge under the Insolvent Debtors' Act, replication, that plaintiff, though in England, had not been served with notice of the filing of defendant's petition, held ill. *Reid v. Croft*, 5 Bing. N. C. 68.

When a petitioner is insolvent, the respondent may apply for security for costs. *Ex parte Molineux, re Bright*, 3 Mont. & A. 705; S. C. 1 Dea. 603.

A forfeiture of a lease, accruing on the lessee's insolvency, is waived by acceptance of rent from him after his discharge under the Insolvent Debtors' Act; and the non-payment of a debt, specified in his schedule to be due to the lessor, is not a continuing insolvency, so as to constitute a new forfeiture after such acceptance of rent. *Doe dem. Gatehouse v. Rees*, 4 Bing. N. C. 384.

An insolvent is not, by his discharge under the Insolvent Debtors'

Act, released from an action at the suit of his surety, for money paid after the discharge in respect of an annuity granted by the insolvent before. *Hookam v. Browne*, 4 Bing. N. C. 400.

Where the actual imprisonment of a party within the four walls of a prison follows upon his arrest as one continuous act, within the usual time allowed and required by law and the course of practice, the arrest is, within the 7 Geo. 4. c. 57. s. 34., to be taken to be the "commencement of the imprisonment;" but where, after the arrest is made, any delay not sanctioned by the due course of law takes place, before the actual commitment of the defendant to prison, the commencement of his imprisonment is the actual coming of the party within the walls of the prison. *Yapp v. Harrington*, 5 Scott, 105.

The clause in section 76 of the Insolvent Debtors' Act, 7 Geo. 4. c. 57., by which copies of the assignments to and from the provisional assignee, purporting to be duly certified and sealed, are made sufficient evidence of such assignments, does not apply, where the insolvent has petitioned, and his effects have been assigned under stat. 53 Geo. 3. c. 102. *Doe dem. Threlfall v. Sellers*, 6 Adol. & E. 328.

A prisoner petitioned the Insolvent Debtors' Court for his discharge, and assigned to the provisional assignee, under stat. 1 Geo. 4. c. 119:—*Held*, that the petition, schedule, and pro-

visional assignment, might be proved, after the passing of the 7 Geo. 4. c. 57., according to the directions of section 76 of that act; though it did not appear, that the prisoner had been adjudged to be entitled to his discharge. *Doe dem. Ellis v. Hardy*, 6 Adol. & E. 335.

A declaration in debt for rent alleged a demise by plaintiff to defendant for 70 years, by virtue of which he entered and held till the rent became due. Plea, that after the demise plaintiff was discharged under the Insolvent Debtors' Act, 53 Geo. 3. c. 102., and his estate in the premises was assigned pursuant thereto; and that after the discharge, and after the making of the demise (plaintiff having been authorized by the assignee, after the discharge to remain in possession of the premises, and to make the said demise thereof to defendant,) and before the said rent was due, or the action commenced, defendant received notice from the assignee to pay to him, as such assignee, from thenceforth, all the rent that should accrue from defendant for the said demised premises, and under the said demise in the declaration mentioned, in default of which legal proceedings would be adopted; and that, by reason thereof, defendant became liable to pay the rent to the assignee, the reversion being no longer in plaintiff; and his right to the rent being determined. On special demurrer, it was objected that the defence was ill pleaded, the assignee

not being entitled to the rent, as under the old demise, and the plea not showing any new tenancy commenced between the defendant and the assignee. The Court gave leave to amend, judgment for the plaintiff *nisi*. *Partington v. Woodcock*, 6 Adol. & E. 690.

A defendant, who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the Insolvent Debtors' Act, and that the cause of action has passed to his assignees. *Wettenhall v. Graham*, 6 Scott, 603.

A prisoner in custody on a *capias utlagatum*, for non-payment of damages and costs, may be discharged under the Insolvent Debtors' Act, 7 Geo. 4. c. 57., without previous reversal of the outlawry. *The Queen v. The Commissioners of the Insolvent Debtors' Court, in the matter of Hamlin*, 3 Nev. & P. 543.

The assignment of an insolvent debtor's estate and effects to the creditors' assignee, under 7 Geo. 4. c. 57. s. 19., by the provisional assignee, according to the form pointed out by section 11 for the assignment by the prisoner to the provisional assignee, is valid. *Doe d. Broughton v. Story*, 3 Nev. & P. 106.

The 11 Geo. 4. & 1 Will. 4. c. 38. s. 7. recites, that doubts had existed as to the validity of the assignment from the provisional assignee to the creditors' assignee, and enacts, that such assignment, if made in obedience to the order of Court, shall be deemed

valid. At a trial, where the validity of the assignment from the provisional assignee was a question, a copy of the counterpart of the assignment from the provisional assignee, filed of record, was produced, sealed with the seal of the Insolvent Debtors' Court, which assignment recited that it was made by the order of the Court; and two orders of the Court were also produced, removing the assignees, to whom the provisional assignee had assigned, and appointing others. *Held*, upon this evidence, *per Coleridge J.*, that there was sufficient evidence to assume that the provisional assignee had made the assignment, in obedience to the order of the Court—*sed quare*, *per Lord Denman C. J.*, *Littledale and Williams Js. Ibid.*

Under the Insolvent Act, 1 Geo. 4. c. 119. s. 14. (unrepealed as to assignments made in pursuance of it) if the Commissioners, on the death of an insolvent's assignee, do not appoint another, the insolvent's estate vests in the executor of the deceased assignee. *Abercrombie v. Hickman*, 3 Nev. & P. 676.

A deed of assignment by an insolvent of all his effects, for the benefit of his creditors, executed during his imprisonment, without consideration and without pressure from any creditor, is voluntary, and void under the 7 Geo. 4. c. 57. s. 32. *Binns v. Towsey*, 3 Nev. & P. 88.

In an action of *indebitatus assumpsit* in 100*l.* for goods sold and deli-

vered, the defendant pleaded his discharge from the cause of action under the Insolvent Act; to which the plaintiff replied, that although he, the plaintiff, was named and inserted by the defendant in his schedule, yet he had not any notice of the filing of the petition, or of the time appointed for the hearing upon it. *Held*, on demurrer, that the replication was bad; as it did not allege that the plaintiff was a creditor to the amount of 5*l.*, so as to be entitled to notice under the 42d section of the 7 Geo. 4. c. 57. *Troup v. Boffi*, 3 Mees. & W. 615.

Declarations of a person in insolvent circumstances, to show that he knew of his insolvency, are admissible in evidence, to prove such knowledge, provided the fact of his insolvency be proved *aliunde*. *Thomas v. Connell*, 4 Mees. & W. 267.

Semble, that the fact of the insolvency should be proved, before the declarations are offered in evidence. *Ibid.*

Where an insolvent debtor was discharged, except as to two of the creditors named in his schedule; but it was ordered, that as to those two debts he should not be discharged, until he had been in custody for sixteen months; and one of these creditors (who had not previously commenced an action against him) immediately on his discharge lodged a detainer against him:—*Held*, that the case was within the 15th section of

the Insolvent Act, 7 Geo. 4. c. 57., and therefore that the defendant was not supersedable, on the ground of the plaintiffs not proceeding to declare within two terms. *Buzzard v. Bousfield*, 4 Mees. & W. 368.

Quære, whether the plaintiff was bound to proceed further in the action at all. *Ibid.*

A bill was filed by an insolvent debtor against *A.* (who was in possession of an estate claimed by him) and his assignees, alleging that the assignees had refused to sue for the estate, *because they were apprehensive of incurring personal expenses*; but that they were willing to concur in a sale of it for the benefit of the plaintiff and his creditors,—and that, if the estate were sold, the proceeds would be sufficient to pay the creditors, and to leave a considerable surplus; and praying, that *A.* might be declared to be a trustee of the estate for the plaintiff and his creditors, and that it might be sold and the proceeds paid to the assignees, and that *A.* might be restrained from proceeding with an action which he had brought against the plaintiff. A demurrer to the bill was allowed. *Kaye v. Fosbrooke*, 8 Sim. 28.

Where a person has twice taken the benefit of the Insolvent Debtors' Act, a *chose in action*, to which he became entitled between his first and second insolvencies, passes to the assignees under the second insolvency. *Curtis v. Sheffield*, 8 Sim. 176.

INTEREST.

A proof was rejected by a Commissioner, and a sum set apart and invested, under 1 & 2 *Will.* 4. c. 56. s. 31. On appeal, the Court allowed the proof, but held that the creditor was not entitled to the interest made by the investment. *Ex parte Jamieson, re Mitchell*, 8 M. & S. 715; *S. C.* 2 Dea. 6.

ISSUE.

On a petition by the bankrupt to annul the fiat, for want of the proper requisites,—where the affidavits are diametrically opposite as to the facts, the Court will direct either a *viva voce* examination, or an issue, which, if taken by the bankrupt, will be under his liability to the costs. *Ex parte Bunn*, 3 Dea. 120.

JOINT CREDITORS.

(*Proof by.*)

See PROOF AGAINST JOINT AND SEPARATE ESTATES.

JOINT ESTATE.

See PROOF—PARTNERS.

JOINT STOCK COMPANY.

Where a bankrupt pledges shares in a company, which belonged to his wife before marriage, notice must be given to the company, before the act of bankruptcy: or they will be held to be in the reputed ownership of the bankrupt. *Ex parte Spencer, re Mitchell*, 3 Mont. & A. 697; *S. C.* 1 Dea. 468.

Where the same person is secretary to two insurance companies, *quare*, whether his knowledge of a deposit of shares, acquired by him as secretary to one of the companies, amounts to notice to the other, so as to prevent the operation of the clause of reputed ownership. *Ex parte Bignold, re Theobald*, 3 Dea. 151.

The bankrupt agreed with *A.*, the managing director of a railway company, that certain shares belonging to the bankrupt should be a security for the payment of a bill accepted by *A.*, for the accommodation of the bankrupt, and which the bankrupt discounted with *B.*, with whom the certificates of the shares were deposited; but no formal notice to the company was given of the transaction, until four days before the fiat issued; nor was any transfer made of the shares in the books of the company, which were still standing in the bankrupt's name at the time of his bankruptcy. By the rules of the company, no shares could be transferred, without the consent of the director; and *A.*, as managing director, received all applications for the transfer of shares.—*Held*, that the shares were not in the order and disposition, or reputed ownership, of the bankrupt. *Ex parte Harrison, re Medley*, 3 Dea. 185.

A Joint Stock Banking Company made advances to a bankrupt's firm, on the security of shares in the bank, which stood in the separate names of the two partners, in compliance with

the rule of the company, that no shares should be held jointly,—but which the partners, nevertheless, agreed should be considered partnership property.—*Held*, that the company could not prove the amount of their debt, without deducting the value of the shares; *dissentiente* Sir J. Cross. *Ex parte Connell, re Clarke*, 3 Dea. 201.

To assumpsit by the assignees of a bankrupt, J., for the non-acceptance of shares in the Great Western Railway, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day subsequent to the bankruptcy,—the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant; the defendant (among other pleas) pleaded that the plaintiffs were not proprietors of the shares, and that they did not tender certificates of them to the defendant. In order to prove their proprietorship of the shares, the plaintiffs put in the transfer book kept by the company, under the Railway Act, 6 & 7 Will. 4. c. 107. s. 158., in which the plaintiffs were entered as transferees.—*Held*, that this was not sufficient evidence of their title. *Hare v. Waring*, 3 Mees. & W. 362.

The certificates, tendered by the plaintiffs to the defendant, did not contain the names of the plaintiffs, as original proprietors, nor had they any indorsement of transfer to them. *Held*, that such certificates were in-

sufficient, inasmuch as they did not show a title in the plaintiffs to convey the shares under the act; (sections 147, 158). *Ibid*.

The 7 Geo. 4. c. 46., which authorizes the establishment of joint stock banking companies, by sect. 9, enables one of the public officers of any such company, nominated pursuant to the provisions of the act, to sue and be sued, and to prosecute commissions of bankruptcy on behalf of the company, against any persons, whether members of the copartnership or otherwise. The 1 & 2 Vict. c. 96., which professes to amend this enactment, declares, that any such public officer may in his own name “commence and prosecute any action, suit, or other proceeding at law, or in equity” against any member of the copartnership, and that such member shall be liable to be proceeded against by such public officer “by such proceedings, and with the same legal consequences, as if such person had not been a member of the said copartnership;” but the last section omits to specify commissions or fiats of bankruptcy, *eo nomine*. *Held*, that the two acts were to be taken together, and that the public officer was authorized to sue out a fiat in bankruptcy against one of the members of the company. *Ex parte Hall, re Hall*, 3 Dea. 405.

The affidavit of the public officer stated, “that he was a registered officer, duly authorized to sue on behalf of the company, united for the

purpose of carrying on business, pursuant to the act of parliament," without stating that he was duly nominated, or that the company were then actually carrying on business. *Held*, that this was a sufficient allegation in the affidavit of the officer's authority, and that the company were then in fact carrying on business. *Dissent.* Sir J. Cross. *Ibid.*

The bankrupt, on the 1st of March, deposited with the petitioner certificates of shares in a German mining company, for securing a loan of money, with an agreement accompanying the deposit, by which he engaged to complete the transfer of the shares, when required. The petitioner sealed up these documents in a packet, which she entrusted to the bankrupt to keep in his iron safe, for better security; where the same remained until three weeks before the bankruptcy, when it was reclaimed by the petitioner. The bankrupt, long before his bankruptcy, told one of the directors of the company, that he had deposited the certificates with the petitioner; and this director, on the morning of the 7th December, communicated that fact to the board of directors; and in the evening of that day the act of bankruptcy was committed.—*Held*, that the shares were not in the reputed ownership, or in the order and disposition of the bankrupt, at the time of his bankruptcy. *Ex parte Ann Richardson, re Christopher Richardson*, 3 Dea. 496.

Seemle, that the shares in a commercial company, possessing lands in a foreign country, for the purposes of trade, are not to be considered as real property. *Ibid.*

JUDGMENT.

Seemle, that Commissioners may inquire into the consideration for a judgment debt; *dissentiente*, Sir J. Cross, unless on the ground of fraud. *Ex parte Marson, re Ridsdale*, 3 Dea. 79.

JURISDICTION.

Seemle, the Lord Chancellor has jurisdiction to sanction an arrangement made by a bankrupt with his assignees, to submit to the commission, on payment to him of a certain sum out of his estate, and to order his assignees to pay to him a portion of that sum, in pursuance of such arrangement, the major part of the bankrupt's creditors, both in number and value, having agreed to the arrangement at a meeting duly convened for that purpose. *Ex parte Jarrard, re Chambers*, 3 Dea. 1.

Where the common order is made for the sale of the bankrupt's estate, on the petition of an equitable mortgagee, the Court of Review has jurisdiction to compel the purchaser specifically to perform his contract, and for that purpose to refer it to the Registrar of the Court, to inquire whether the vendors can make a good title to the property. *Ex parte*

Brettell, re Goren, 3 Dea. 111. But see *Ex parte Cutts*, 2 Dea. 242.

The Court of Review has not jurisdiction to order the special performance of a contract against a purchaser at a sale, which took place under the common order made by that Court, on the petition of an equitable mortgagee. *Ex parte Cutts, re Goren*, 3 Dea. 242.

The Court of Review has no jurisdiction to order a fund in Court to be distributed amongst the creditors of a testator, to whose estate the fund belonged; the proper proceeding being by bill in equity for the distribution of assets; but the Court made a special order for the transfer of the fund to the Accountant-General of the Court of Chancery, as soon as a bill should be filed by the creditors. *Ex parte Williams, re Knight*, 3 Dea. 378.

If a mortgagee presents a petition, claiming priority over several mortgages, over whom the Court has no jurisdiction, it will be dismissed. *Ex parte Bignold, re Francis*, 3 Mont. & A. 706; *S. C.* 1 Dea. 515.

But it seems, that the Court will determine the question of priority between any two claimants, who submit the question to the Court. *Ibid.*

After a petition for annulling the fiat has been heard and disposed of by the Court of Review, the Lord Chancellor can only interfere in his appellate, and not in his original, jurisdiction in bankruptcy; and an appeal to remove the order on such

a petition must be brought before him by way of special case, unless he shall otherwise direct; which direction will only be given under very special circumstances. *Ex parte Stubbs, re Hall*, 3 Dea. 549.

Lord Brougham's observations in *Ex parte Keys*, 1 Mont. & A. 242; 3 Dea. & C. 275; as to the Lord Chancellor's jurisdiction in all matters relating to the fiat being wholly untouched by the provisions of the 1 & 2 Will. 4. c. 56., corrected. *Ibid.*

LANDLORD AND TENANT.

See LEASE.

LEASE.

A forfeiture of a lease, accruing on the lessee's insolvency, is waived by acceptance of rent from him after his discharge under the Insolvent Debtors' Act; and the non-payment of a debt, specified in his schedule to be due to the lessor, is not a continuing insolvency, so as to constitute a new forfeiture after such acceptance of rent *Doe dem. Gatehouse v. Rees*, 4 Bing. N. C. 384.

Where a tenant, at a rent payable half-yearly, against whom a fiat of bankruptcy issues during a current half year, delivers up possession of the premises to his landlord, according to 6 Geo. 4. c. 16. s. 75., he is not liable in assumpsit for his use and occupation, for the portion of the half year prior to the fiat. *Slack v. Sharp*, 3 Nev. & P. 390.

A tenant under a parol agreement, is within the protection of that section. *Slack v. Sharp*, 3 Nev. & P. 390.

LIEN.

The petitioner struck a docket against the bankrupt, which he afterwards abandoned, and entered into an arrangement, by which the bankrupt assigned all his property to the petitioner, in trust for himself and the other creditors. After the petitioner had taken possession of the bankrupt's property, and incurred some expense in the execution of the trusts, another creditor sued out a fiat against the bankrupt, under which the assignees seized the bankrupt's property in the hands of the petitioner.—*Held*, that the petitioner had no lien on the property, as against the assignees; the docket struck by him being *prima facie* evidence of his having notice of an act of bankruptcy, prior to the trust assignment, and the assignment itself amounting to an act of bankruptcy. *Ex parte Swinburne, re Field*, 3 Dea. 396.

LORD CHANCELLOR.

And see JURISDICTION.

Seem, that the Lord Chancellor has jurisdiction to sanction an arrangement made by a bankrupt with his assignees,—to submit to the commission, on payment to him of a certain sum out of his estate,—and to order his assignees to pay to him a portion of that sum, in pursuance of such arrangement; the major part

of the bankrupt's creditors, both in number and value, having agreed to the arrangement at a meeting duly convened for that purpose. *Ex parte Jerrard, re Chambers*, 3 Dea. 1.

MARRIAGE SETTLEMENT.

A marriage settlement having been lost, which declared the trusts of a fund belonging to the wife; and there being every probability that the petitioners were entitled to it, under the provisions of the settlement; they were, after being admitted to prove for the amount, allowed to receive the dividends, without a reference, as the fund was too small to bear that expense. *Ex parte Harrison, re Dornford*, 3 Dea. 25.

MERGER.

The bankrupts gave a joint and several promissory note for 2000*l.*, to secure advances made to them by their bankers; and when they were indebted to the bankers in 1957*l.*, one of the bankrupts mortgaged certain property to them, to secure that sum, and all such further sums as might be advanced, to the extent of 3000*l.*, including the said sum of 1957*l.* At the time of the bankruptcy, the amount of the debt due to the bankers was 4365*l.*, of which sum they realized the 3000*l.* under the mortgage.—*Held*, (*Erskine, C. J., dissent.*) that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of their debt. *Ex parte Bate, re Bishton*, 3 Dea. 358.

Where a legal mortgage was executed by the bankrupt, in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, which rendered it an unavailable security; it was held, that it did not operate as a merger of the equitable mortgage, and that the party was entitled to the usual order, as equitable mortgagee. *Ex parte Harvey, re Emery*, 3 Dea. 547.

MESSENGER.

It is not multifarious to pray for the taxation both of the solicitor's and messenger's bill; but the petitioner should not pray costs against the messenger. *Ex parte Pring, re Davis*, 3 Dea. 322.

MINUTES.

Where there is no variation between the minutes and the Order, as pronounced by the Court, the Court will not entertain an application to vary the minutes; the proper course for any party dissatisfied with the Order being, to apply for a re-hearing. *Ex parte Dolly, re Bowerman*, 3 Dea. 51.

MORTGAGE.

And see EQUITABLE MORTGAGE.

The stat. 6 Geo. 4. c. 16. s. 70. does not enable the assignees of a bankrupt mortgagor to re-vest the legal estate in themselves, by tender or payment to the mortgagee, after the day, on which by the deed the

mortgage becomes absolute, in default of payment; though a tender or payment before the day will, under that section, vest the legal estate in them. *Dunn v. Massey*, 6 Adol. & E. 479.

If a mortgagee presents a petition, claiming priority over several mortgagees, over whom the Court has no jurisdiction, it will be dismissed. *Ex parte Bignold, re Francis*, 3 Mont. & A. 706; S. C. 1 Dea. 515.

The interest of the mortgagee who petitions, where there are other mortgages on the property, cannot alone be sold; as the conflicting claims would render it of no value. *Ibid.*

It seems the Court will determine the question of priority between any two claimants, who submit the question to the Court. *Ibid.*

A mortgagee may, in a complicated case, enter a claim for his debt, till the question of right is determined. *Ibid.*

The bankrupt executed a mortgage, with a power of sale, subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid:—*Held*, that the mortgagee might have the common order for sale, with liberty to prove for the residue. *Ex parte Bignold, re Theobald*, 3 Dea. 151.

A legal mortgagee obtained the usual order for sale of the property; previous to which it was arranged between himself and the assignees, that he should be placed in the same situation, as if he had given notice to the tenants.—*Held*, that the mort-

gagee was, under these circumstances, entitled to the crops growing on the estate, at the time of the order of sale. *Ex parte Barnes, re Medley*, 3 Dea. 223.

Quære, whether, in the absence of any such arrangement, the mortgagee is not entitled to have the estate sold, in the same condition as it stands at the date of the order for sale. *Ibid.*

The solicitor to the fiat, who was a mortgagee of the bankrupt's estate, obtained leave to bid at the sale. But *quære*, whether he can have leave to purchase. *Ex parte Briggs, re Winchester*, 3 Dea. 238.

The bankrupts gave a joint and several promissory note for 2000*l.*, to secure advances made by their bankers; and when they were indebted to the bankers in 1957*l.*, one of the bankrupts mortgaged certain property to them, to secure that sum and all such further sums as might be advanced, to the extent of 3000*l.*, including the said sum of 1957*l.* At the time of the bankruptcy, the amount of the debt due to the bankers was 4365*l.*, of which sum they realized the 3000*l.* under the mortgage. — *Held*, (*Erskine, C. J. dissent.*) that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of their debt. *Ex parte Bate, re Bishton*, 3 Dea. 358.

Where a mortgagee of certain lands, which were held under leases for lives renewable for ever, had become bankrupt; and, an ejectment for non-

payment of rent had been brought by the head landlord, and the premises redeemed by the assignees within the time allowed by the statute to mortgagees, who subsequently entered into possession by their agent: — *Held*, on a bill filed by an annuitant, claiming under a deed of settlement prior to the date of the mortgage, that the assignees were chargeable as mortgagees in possession, and were bound to appropriate the rents and profits of the lands which they had received, or without wilful default might have received, in discharge of the redemption money, in priority to that of their own mortgage. *Sloane v. Mahon*, 1 Drury & Walsh, 189.

A., B., and C. carrying on business in partnership in premises belonging to *A.*, *A.* executes a mortgage of the property to a banking company, with a power of sale, for securing 6000*l.*, the amount of advances to the partnership by the bank. *A.* afterwards dies, having devised the property to *B.* and *C.*, who, becoming insolvent, make an assignment of all their estate and effects in trust for their creditors; and the trustees, with the sanction of the bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking company the 6000*l.* by yearly instalments. A fiat afterwards issues against *B.* and *C.*, under which the bank proves for the whole amount of their debt, including the 6000*l.* On

a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be payed into Court, subject to further order. *Ex parte Smyth, re Steel*, 3 Dea. 597.

MULTIFARIOUSNESS.

It is not multifarious to pray for the taxation both of the solicitor's and messenger's bills; but the petitioner should not pray costs against the messenger. *Ex parte Pring, re Davis*, 3 Dea. 322.

MUTUAL CREDIT.

See SET-OFF.

NOTICE OF ACT OF BANKRUPTCY.

And see SHERIFF.

(Evidence of.)

The defendant, being in the employment of *J.* in his trade, sold, *bond fide*, some goods belonging to *J.*, after *J.* had committed an act of bankruptcy, of which the defendant was ignorant. The sale was more than two months before the fiat issued. The defendant acted under a general authority. The assignee brought trover. *Held*, on an issue joined on a traverse of the assignee's possession, that the plaintiff must recover, no evidence having been given that the purchaser was ignorant of the bankruptcy; sections 81 and 82 of the 6 Geo. 4. c. 16. protecting the transfer, only, where the party dealing with the bankrupt is without no-

tice; and the burthen of proof being here on the defendant, who affirmed the sale. *Pearson v. Graham*, 1 Adol. & E. 899.

OFFICIAL ASSIGNEE.

An official assignee may file a bill against the personal representatives of a deceased assignee, for an account &c. of unclaimed dividends possessed by the deceased assignee; and the non-claiming creditors need not be parties to the suit. *Green v. Weston*, 3 Mont. & A. 414.

A special order made, on the resignation of an official assignee. *Ex parte Goldsmid*, 3 Dea. 309.

The official assignee of a bankrupt's estate filed a bill against the respective personal representatives of two successive assignees, for an account and payment of monies, which, having formed part of the bankrupt's assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The monies consisted, partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both the assignees died before the passing of the 6 Geo. 4. c. 16. The bill was filed in 1834; and in the following year the 5 & 6 Will. 4. c. 29. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified.—

Held, that the official assignee was competent to maintain such a suit, and that the particular creditors, to whom the unclaimed dividends had been allotted, and the attorney-general, were not necessary parties to it. *Green v. Weston*, 3 Mylne & C. 385.

An official assignee is not entitled to any commission on the amount of the proceeds of the sale of the bankrupt's mortgaged property, which were paid over by the purchaser to the mortgagee, and which were not sufficient to satisfy the debt due on the mortgage; the official assignee having rendered no service in effecting the sale. He is only entitled to such an allowance out of the bankrupt's estate, to remunerate his services, as shall appear to the Commissioner, upon consideration of the bankrupt's property, and the nature of the duties of the official assignee, to be just and reasonable. *Ex parte Whisson, re Carter*, 3 Dea. 646.

ONUS PROBANDI.

See NOTICE.

ORDER.

And see GENERAL ORDER.

Where there is no variation between the minutes and the order as pronounced by the Court, the Court will not entertain an application to vary the minutes; the proper course for any party dissatisfied with the order being, to apply for a re-hearing. *Ex parte Dolly, re Bowerman*, 3 Dea. 51.

A petition is necessary to set aside an order. It cannot be done on motion. *Ex parte Haward*, 3 Dea. 324.

A petition to revive a former order is of course, unless some hardship can be shown from such revivor. *Ex parte Evans*, and *Ex parte Ellis, re Evans*, 3 Dea. 381.

ORDER AND DISPOSITION.

And see REPUTED OWNERSHIP.

A., a broker, on the behalf of the owner of a ship, entered into a charter-party with *B.*, by which *B.* agreed to pay to *A.*, on behalf of the owner, a certain sum for the freight of the ship. The owner assigned the freight and earnings that might become due under the charter-party to *C.*, as a security for a debt; and *C.* gave notice of the assignment to *A.*, but not to *B.* The vessel completed her voyage, and afterwards the owner became bankrupt.—*Held*, that the money due on the charter-party was not in his order and disposition at his bankruptcy. *Gardner v. Lacklan*, 8 Sim. 123.

OUTLAWRY.

A prisoner in custody on a *capias utlagatum*, for non-payment of damages and costs, may be discharged under the Insolvent Debtors' Act, 7 Geo. 4. c. 57., without previous reversal of the outlawry. *The Queen v. The Commissioners of the Insolvent Debtors' Court. In the matter of Hamlin*, 3 Nev. & P. 543.

PARTNERS.

(Where Proof allowed against the separate Estate of one of several Partners.)

H. deposits with *W.*, his agent, Virginia bonds for 50,000 dollars, which *W.*, in July 1836, pledges with a third person as a security for his own debt. In September 1836 *H.* applies to *W.* to grant him a credit for 10,000*l.*, on the security of the Virginia bonds; which *W.* agrees to do, but says nothing about having previously pledged them for his own purpose. On the 1st October 1836, *H.* draws bills on *W.* to the amount of 10,000*l.*, which are accepted by *W. & C.*, (*W.* having taken *C.* into partnership on the very day the bills were drawn) and the bills are duly paid by *W. & C.* at maturity; *H.*, at the request of *W. & C.*, remitting 7000*l.* towards the payment of them. Subsequent dealings take place between *H.* and *W. & C.*, until the latter stop payment; when they make a balance to be due to them from *H.*, but take no notice of the Virginia bonds, the chief part of which had been already redeemed by *W. & C.*, and pledged again with another person for a partnership debt from *W. & C.*—*Held*, that the subsequent dealings of *H.* with the partnership of *W. & C.* did not deprive him of his right to prove the amount of the bonds against the separate estate of *W.* *Ex parte Meinertzhagen, re Warwick and Claggett*, 3 Dea. 101.

One of two partners deposits the deeds of his own estate, by way of equitable mortgage, to secure a part-

nership debt, and afterwards becomes bankrupt, the other partner being solvent:—*Held*, that an order may be made for the sale of the equitable mortgage, but no proof allowed against the bankrupt partner, for the purpose of receiving dividends. *Ex parte Lloyd, re Ireland and Harrison*, 3 Dea. 305.

A joint creditor can prove against the separate estate, where there is no joint estate, and no solvent partner; notwithstanding the estate of a deceased partner may be solvent. *Ex parte Bauerman, re Lomax*, 3 Dea. 476.

It is not a sufficient reason for expunging such proof, that there was a partner actually solvent at the time it was made, if he became insolvent shortly afterwards. *Ibid.*

Quære, Whether the rule on this subject, as applicable to partners, applies to persons who are not partners, but merely joint contractors. *Ibid.*

(When Proof not allowed against the separate Estate.)

Upon the formation of a partnership between *W.* and *C.*, *W.* proposes to *J. & Co.*, to whom he was indebted for previous advances, to "consider all credits, advices, and instructions then in force from him, as extending to the new firm, and to transfer any balances, that may be either due to or from him to the new firm." To this proposal *J. & Co.* accede, and accordingly draw bills on *W. & C.* on account of former dealings with *W.* The bills are not paid when due, and *W. & C.* become bankrupt.

Held, that *J. & Co.*, after this adoption of *W. & C.* as their joint debtors, could not prove against the separate estate of *W.*, but only against the joint estate of *W. & C.* *Ex parte Whitmore, re Warwick*, 3 Dea. 365.

(Where a separate Debt not converted into a Joint Debt.)

A. being indebted to *C.* on three bills of exchange, *B.* guarantees the payment of them, and afterwards *A.* and *B.* enter into partnership. When the first bill falls due, *A.* and *B.* remit to *C.* a portion of the amount, and solicit his indulgence for the remainder; and on a subsequent occasion, when another bill fell due, *A.* and *B.* wrote again to *C.* for indulgence, saying that they were arranging means to pay in full all liabilities resting on the business, and *C.* as well as others. *C.* returned no answer to these letters, but forbore to take hostile proceedings either against *A.* or *B.*, who afterwards became bankrupts.—*Held*, that, in the absence of all direct evidence of the assent of *C.*, the separate debt was not converted into a joint debt, and could not be proved by *C.* against the joint estate. *Ex parte Hitchcock, re Worth*, 3 Dea. 507.

(Where Bill given by one Partner for his separate Debt.)

If a creditor draw a bill upon a firm, for his separate debt due from one partner, which is accepted by that partner in the name of the firm,

the creditor cannot prove against the joint estate, without showing the assent of the other partner to the firm being liable. *Ex parte Thorpe, re Wardley*, 3 Mont. & A. 716; *S. C.* 2 Dea. 16.

(Election of Proof against.)

Where *A.* and *B.* carried on a partnership trade under their separate names, one residing at Manchester, and the other at London; it was *held*, that the holder of bills drawn by one partner upon the other, must elect, whether he would prove against the joint or separate estates; and that he was not concluded by a proof already made, and the receipt of a dividend under the separate estate; but, on refunding the dividend, might retire his proof from the separate estate, and prove against the joint. *Ex parte Law, re Bayley*, 3 Dea. 541.

(Where Proof allowed by one Partner against the Estate of another.)

Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer, and then dissolve the partnership; upon which occasion the two continuing partners give the executors a bond to secure the balance due to them; and more than six years afterwards the two become bankrupt. *Held*, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. *Ex parte Hall, re Boothby*, 3 Dea. 125.

Where *A.*, *B.*, and *C.* are partners, and *B.* becomes bankrupt after the partnership is dissolved, and *A.* petitions for an account to be taken between himself and *B.*; *semble*, that *C.* ought to be served with the petition; and that *A.* cannot prove under the fiat against *B.*, without showing that all the partnership debts have been paid. *Ex parte May, re Malachy*, 3 Dea. 382.

(*What is Joint and what Separate Property.*)

A joint stock banking company made advances to a bankrupt firm, on the security of shares in the bank, which stood in the separate names of the two partners, in compliance with the rule of the company, that no shares should be held jointly, but which the partners agreed should nevertheless be considered partnership property. *Held*, that the company could not prove the amount of their debt, without deducting the value of the shares; *dissentiente*, Sir *J. Cross*. *Ex parte Connell, re Clark and Parry*, 3 Dea. 201.

(*Where not estopped from being Petitioning Creditors.*)

It is not because the name of a creditor is inserted as one of the trustees in a trust deed, that the firm, of which he is a partner, cannot sue out a fiat as petitioning creditors; if the deed was not executed by himself, nor any member of the firm. *Re Wood*, 3 Dea. 514.

PAWNBROKER.

A pawnbroker, who, in taking pledges, omits to pursue the course required by 39 & 40 Geo. 3. c. 99. s. 6, acquires no property in the pledges, and cannot maintain a lien on them in an action of trover brought against him by the assignees of the pawner, who afterwards becomes bankrupt. *Fergusson v. Norman*, 5 Bing. N. C. 76.

PAYMENTS.

S., being sued by the defendant, paid money into Court in lieu of bail, on the 13th September, having omitted to put in bail, or pay the additional sum required as security for costs; the Court ordered the money to be paid to the defendant on the 23d September; on the 9th, *S.* had committed an act of bankruptcy; and on the 28th, a fiat was issued against him.—*Held*, that the assignees could not recover from the defendant the money so paid to him by order of the Court. *Reynolds v. Wadd*, 4 Bing. N. C. 694.

A bankrupt having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money:—*Held*, that the transaction, though *bond fide*, and without notice of an act of bankruptcy, was not protected by section 82 of 6 Geo. 4. c. 16.; but that his assignees might recover the value in trover. *Wright v. Fearnley*, 5 Bing. N. C. 89.

PENSION.

The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

PETITION.

(When the proper Form of Proceeding.)

A petition is necessary to set aside an order. It cannot be done on motion. *Ex parte Haward*, 3 Dea. 324.

(Necessary Allegations in.)

On a petition by the bankrupt to expunge a proof, he should allege in his petition, that there is a probability either of a surplus, or of his being entitled to an allowance. *Ex parte Pitchforth, re Pitchforth*, 3 Dea. 487.

A petition to the general jurisdiction of the Court, for the taxation of a bill of costs, must set out objectionable items; and a general reference to the bill of costs is not sufficient. *Ex parte Moore, re Cartwright*, 3 Mont. & A. 699; S. C. 1 Dea. 578.

If the petition state, as objectionable, items already disallowed by the Commissioner, it is insufficient; but it seems that it may stand over to be amended. *Ibid.*

(Attestation of.)

The word "witness," prefixed to the name of the solicitor attesting the signature of the party presenting the petition, amounts to a sufficient at-

testation, within the meaning of the general order. *Ex parte Stocken, re Stocken*, 3 Dea. 610.

(How entitled.)

A joint fiat having issued against *A.* and *B.*, and *B.* only being proved a bankrupt, a petition was presented by *A.* to annul it, entitled, "In the matter of *B.*" *Semble*, that the petition should have been entitled, "In the matter of *A.* and *B.*" *Ex parte Fisher, re Fisher*, 3 Dea. 695.

(Service of.)

Quære, whether a petition to tax the petitioning creditor's bill of costs must be served upon him. *Ex parte Moore, re Cartwright*, 3 Mont. & A. 699; S. C. 1 Dea. 578.

If a petitioner seeks to prove, as well as stay the certificate,—or if the petition imputes any improper conduct against the assignees,—the petition ought to be served on the assignees. *Ex parte May, re Malachy*, 3 Dea. 382.

Where *A.*, *B.* and *C.* are partners, and *B.* becomes bankrupt, and *A.* petitions for an account to be taken between himself and *B.*; *semble*, that *C.* ought to be served with the petition. *Ibid.*

(Filing.)

An order of dismissal cannot be drawn up, if the petition has not been filed in the office. *Ex parte Carnes, re Griffiths*, 3 Dea. 124.

The proper course is, in such case, to move to discharge the fiat at the

foot of the petition, with costs. *Ex parte Carnes, re Griffiths*, 3 Dea. 124.

(*Hearing of.*)

A petition having been presented to the Lord Chancellor to annul a fiat, is not a sufficient reason for the Court of Review declining to hear a petition on a collateral matter under the same fiat. *Ex parte Higgs, re Evans*, 3 Dea. 474.

(*When ordered to stand over.*)

The mere circumstance of a petition being ordered to stand over, on the application of a party, does not prevent that party from filing fresh affidavits. *Ex parte Worthington, re Oulton*, 3 Dea. 332.

Where a petition is ordered to stand over, because the counsel is not prepared with an affidavit of service, the Court will not allow it to keep its place in the paper, if the counsel, in the next petition, objects. *Ex parte Crossley, re Crossley. Ex parte Hall, re Hall*, 3 Dea. 484.

(*By Assignees.*)

Where one of several assignees presents a petition, he must either make his co-assignees parties to it, or serve them with the petition. *Ex parte Fosbrooke, re Fisher*, 3 Dea. 686.

(*Dismissal of.*)

After a petition is ordered to be dismissed with costs, because the petitioner declines to open it, the Court will not, on a subsequent day,

entertain an application from him to exclude from the allowance of costs certain affidavits of the respondent, on the ground that they were filed too late to be read. If the affidavits are not filed in time, the petitioner should open his petition, in order to take the objection as to their disallowance. *Ex parte Sidebotham, re Clarke*, 3 Dea. 221.

(*To Annul.*)

See ANNULING FIAT.

(*To stay Certificate.*)

See CERTIFICATE.

(*When Multifarious.*)

See MULTIFARIOUSNESS.

PETITIONING CREDITOR.

Quære, whether a petition, to tax the petitioning creditor's bill of costs, must be served on him? *Ex parte Moore, re Cartwright*, 3 Mont. & A. 699; S. C. 1 Dea. 578.

If a creditor, who is a party to a deed of assignment of a trader's property for the benefit of his creditors, issues a fiat against him, it will be annulled with costs. *Ex parte Bunn, re Bunn*, 3 Dea. 119.

The petitioning creditor, who issues a fiat upon an insufficient debt, cannot, before the expiration of the time for opening, issue a new fiat, in conjunction with another creditor. *Ex parte Ward, re Westwood*, 3 Mont. & A. 394.

A petitioning creditor, on finding

that he has not a good debt, may petition to annul, before the time for opening the fiat. *Ex parte Rogers*, 3 Mont. & A. 506.

It is not because the name of a creditor is inserted as one of the trustees in a trust deed, that the firm (of which he is a partner) cannot sue out a fiat as petitioning creditors, if the deed was not executed by himself, nor any member of the firm. *Re Wood*, 3 Dea. 514.

The petitioning creditor issued a fiat on the 20th December 1837, but forbore to prosecute it, to enable the bankrupt, who had some disputes pending with his partner, to settle them by arbitration. The award was not made till the 14th February 1839, when the petitioning creditor applied for leave to issue another fiat; but the application was refused both by the Court of Review, and the Lord Chancellor. *Ex parte Foljambe*, *re Hewitt*, 3 Dea. 628.

PETITIONING CREDITOR'S DEBT.

Where an application is made to substitute a new petitioning creditor's debt, during the pendency of an action, in which the defendant has given notice to dispute the debt, the Order must be, without prejudice to the defence in the pending action. *Ex parte Watson*, *re Clarke*, 3 Dea. 310.

A solicitor may take out a fiat, as petitioning creditor, on the amount of his bill, before it is taxed; but, if after taxation it is reduced below

100*l.*, the fiat will be annulled. *Ex parte Ford*, *re Ford*, 3 Dea. 494.

PLEDGE.

See PAYMENTS.—RELATION TO ACT OF BANKRUPTCY.

POWER OF ATTORNEY.

One power of attorney, from several creditors, is sufficient to authorize a party to sign a consent on their respective behalfs, to annul the fiat. *Ex parte Richardson*, *re Warwick and Clagett*, 3 Dea. 377.

PRACTICE.

And see PETITION.

An order of dismissal cannot be drawn up, if the petition has not been filed in the office. *Ex parte Carnes*, *re Griffiths*, 3 Dea. 124.

The proper course is, in such case, to move to discharge the fiat at the foot of the petition, with costs. *Ibid.*

Practice as to confirming the registrar's report, on a reference to appoint a trustee. *Anon.* 3 Dea. 223; *S. C.* *Ex parte Masfield*, *re Brooks*, 3 Mont. & A. 487.

PRINCIPAL AND AGENT.

A foreign merchant remits bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds. The factor sells the bills; but before the receipt of the purchase-money becomes bankrupt, and dishonours the merchant's drafts for the amount. *Held*, that the merchant, and not the

factor's assignees, was entitled to the proceeds; notwithstanding the bills had been indorsed both by the principal and the factor, and were sold by the factor in his own name. *Ex parte Pauli, re Trye and Lightfoot*, 3 Dea. 169.

PROCEEDINGS.

(*Inspection of.*)

On a petition of the bankrupt to annul the fiat, the Court will look at the proceedings, to see whether the requisites to support it are established by the depositions; and, if not satisfied in this respect, will either order further affidavits to be made, or a *voir dire* examination. But, if no act of bankruptcy appears on the proceedings, the bankrupt is entitled to have the fiat annulled. *Ex parte Foster, re Foster*, 3 Dea. 175.

On a *bond fide* petition of the bankrupt to annul, the Court will let him see the proceedings, or order him to be provided with copies of the depositions; *aliter*, if the Court suspect it is not the petition of the bankrupt, but of a third party for a clandestine purpose. *Ibid.*

PRODUCTION OF DOCUMENTS.

A party, on his examination before the Commissioners, was compelled by them to produce a book, which was lawfully in his possession, and which, on being produced, the assignees laid their hands on, and refused to return. The Court, without entering into the

question, as to who had the legal title to the book, ordered it to be delivered up to the party who had the lawful possession of it, when it was produced before the Commissioners. *Ex parte Gilbard, re Malachy*, 3 Dea. 488.

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PROOF OF DEBTS.

(*On Annuities.*)

See title ANNUITIES.

(*On Bills and Notes.*)

See BILLS AND NOTES.

(*On Judgments.*)

Seem, that Commissioners may inquire into the consideration for a judgment debt; *dissentiente*, Sir J. Cross, unless on the ground of fraud. *Ex parte Marson, re Ridsdale*, 3 Dea. 79.

(*Unliquidated Damages.*)

The damages, arising from a breach of contract to accept goods at a certain price on a certain day, are not proveable under a fiat. *Green v. Bicknell*, 3 Nev. & P. 634.

Contracts to deliver stock on a certain day are an exception to this rule. *Ibid.*

PROOF.

(*Against Separate Estate.*)

H. deposits with *W.*, his agent, Virginia bonds for 50,000 dollars, which *W.* in July 1836 pledged with

a third person, as a security for his own debt. In September 1836, *H.* applies to *W.* to grant him a credit for 10,000*l.* on the security of the Virginia bonds, which *W.* agrees to do, but says nothing about having previously pledged them for his own purpose. On the 1st October 1836, *H.* draws bills on *W.* to the amount of 10,000*l.*, which are accepted by *W. & C.*,—*W.* having taken *C.* into partnership on the very day the bills were drawn,—and the bills are duly paid by *W. & C.* at maturity; *H.*, at the request of *W. & C.*, remitting 7000*l.* towards the payment of them. Subsequent dealings take place between *H.* and *W. & C.*, until the latter stop payment; when they make a balance to be due to them from *H.*, but take no notice of the Virginia bonds; the chief part of which had been already redeemed by *W. & C.*, and pledged again with another person for a partnership debt from *W. & C.* *Held*, that the subsequent dealings of *H.* with the partnership of *W. & C.* did not deprive him of his right to prove the amount of the bonds against the separate estate of *W.* *Ex parte Meinertzhagen, re Clagett*, 3 Dea. 101.

A joint creditor can prove against the separate estate, where there is no joint estate, and no solvent partner; notwithstanding the estate of a deceased partner may be solvent. *Ex parte Bauerman, re Lomax*, 3 Dea. 476.

It is not a sufficient reason for ex-

punging such proof, that there was a partner actually solvent at the time it was made, if he became insolvent shortly afterwards. *Ibid.*

A., B., and C., partners in trade, together with *D.* as their surety, enter into a joint and several bond to certain bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond, there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but at the time of the bankruptcy of *A., B., and C.*, a much larger balance was due from them to the bankers, than the sum secured by the bond. *D.*, the surety, died; and in a creditor's suit brought by the bankers against his representatives, (to which suit the assignees of *A., B., and C.* were also parties) it was found, that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that should become due to them; but that the surety intended the bond to be a security, only, for the particular balance due to them at the date of the bond.—*Held*, that the bond was, under these circumstances, proveable by the bankers against the separate estate of *A.*, for the whole amount of the principal and interest secured by it. *Ex parte Walker, re Fidgeon*, 3 Dea. 672.

(Against Joint Estate.)

If a creditor draw a bill upon a firm, for his separate debt due from one partner, which is accepted by that partner in the name of the firm, the creditor cannot prove against the joint estate, without showing the assent of the other partner to the firm being liable. *Ex parte Thorpe, re Wardley*, 3 M. & A. 716; S. C. 2 Dea. 16.

L., one of three partners, contracts to sell to *D.* 100 shares in a joint stock bank, which were standing in the name of *J.*, one of *L.*'s partners, but which were, in fact, the property of the firm,—and agrees, in consideration of *D.* accepting a bill for the amount of the purchase-money, drawn in the name of the firm, to cause the shares to be duly transferred to *D.* The bill is negotiated by *L. & Co.*, who become bankrupt, before application can be made to the bank to transfer the shares to *D.*; when the bank refuse to make the transfer, claiming a lien on the shares for their own advances. *Held*, that *D.* could not prove against the separate estate of *L.* for money had and received, but only against the joint estate of *L. & Co.* *Ex parte Raleigh, re Rostron*, 3 Dea. 160.

A Joint Stock Banking Company made advances to a bankrupt's firm, on the security of shares in the bank, which stood in the separate names of the two partners, in compliance with the rule of the company that no shares should be held jointly,—but which the

partners agreed should nevertheless be considered partnership property. *Held*, that the company could not prove the amount of their debt against the joint estate, without deducting the value of the shares; *dissentiente* Sir *J. Cross*. *Ex parte Connell, re Clarke and Parrey*, 3 Dea. 201.

Upon the formation of a partnership between *W.* and *C.*, *W.* proposes to *J. & Co.*, to whom he was indebted for previous advances, to "consider all credits, advices, and instructions then in force from him, as extending to the new firm, and to transfer any balances that may be either due to, or from him, to the new firm." To this proposal *J. & Co.* accede, and accordingly draw bills upon *W.* and *C.*, on account of former dealings with *W.* The bills are not paid when due, and *W.* and *C.* become bankrupt. *Held*, that *J. & Co.*, after this adoption of *W.* and *C.* as their joint debtors, could not prove against the separate estate of *W.*, but only against the joint estate of *W.* and *C.* *Ex parte Whitmore, re Warwick*, 3 Dea. 365.

The decision in this case was confirmed on a rehearing, although the account of the dealings between the parties, in respect of which the petitioners claimed a right of proof against the separate estate of *W.*, was kept separate both in the books of the bankrupts, and the petitioners. *Ex parte Jackson, re Warwick*, 3 Dea. 651.

A. being indebted to *C.* on three

bills of exchange, *B.* guarantees the payment of them, and afterwards *A.* and *B.* enter into partnership. When the first bill falls due, *A.* and *B.* remit to *C.* a portion of the amount, and solicit his indulgence for the remainder; and on a subsequent occasion, when another bill fell due, *A.* and *B.* wrote again to *C.* for indulgence, saying that they were arranging means to pay in full all liabilities resting on the business, and *C.* as well as others. *C.* returned no answer to these letters, but forbore to take hostile proceedings either against *A.* or *B.*, who afterwards became bankrupt. *Held*, that, in the absence of all direct evidence of the assent of *C.*, the separate debt was not converted into a joint debt, and could not be proved by *C.* against the joint estate. *Ex parte Hitchcock, re Worth*, 3 Dea. 507.

(*Election of Proof.*)

Where *A.* and *B.* carried on a partnership trade under their separate names, one residing at Manchester and the other at London, it was held, that the holder of bills drawn by one partner upon the other must elect, whether he would prove against the joint or separate estates; and that he was not concluded by a proof already made, and the receipt of a dividend under the separate estate; but, on refunding the dividend, might retire his proof against the separate estate, and prove against the

joint. *Ex parte Law, re Bayley*, 3 Dea. 541.

(*Between Partners.*)

Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer, and then dissolve the partnership; upon which occasion the two continuing partners give the executors a bond to secure the balance due to them; and, more than six years afterwards, the two become bankrupt. *Held*, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. *Ex parte Hall, re Boothby*, 3 Dea. 125.

(*General Right of.*)

A Commissioner is not justified in rejecting the proof of a debt, which is admitted by the bankrupt, and not opposed by the assignees, because the deposition of the creditor is not supported by the evidence of a third person. *Ex parte Chapman, re Clarke*, 3 Dea. 273.

(*After Bankrupt taken in Execution.*)

A creditor having, before the bankruptcy of his debtor, taken him in execution, died shortly before the issuing of the fiat; and the bankrupt, eight months after the issuing of the fiat, obtained a judge's order for his discharge, on the ground that the action abated by the death of the

plaintiff; the plaintiff's executrix interfering in no way whatever to oppose the discharge. *Held*, that the discharge was not an extinguishment of the debt, and that the executrix could prove the amount of it under the fiat. *Ex parte Goodman, re Nainby*, 3 Dea. 631.

(After Order made.)

When the Court makes an order that a creditor shall be permitted to prove for a certain sum, the Commissioner cannot decline to receive the proof, until a private meeting has been called to inquire into the nature of the debt. *Ex parte Richardson, re Warwick and Clagett*, 3 Dea. 377.

(Where Part of Debt received after Proof.)

After the proof of a debt, but before the declaration of a dividend, the creditor received a large portion of the debt from a surety:—*Held*, that this did not prevent the creditor from receiving dividends on the whole amount of his proof. *Ex parte Copplestone, re Snell*, 3 Dea. 546.

(Expunging Proof.)

On a petition by the bankrupt to expunge a proof, he should allege in his petition, that that is a probability either of a surplus, or of his being entitled to an allowance. *Ex parte Pitchforth, re Pitchforth*, 3 Dea. 487.

A., B., and C., carrying on business in partnership in premises belonging to A., A. executes a mortgage of the property to a banking

company, with a power of sale for securing 6000*l.*, the amount of advances to the partnership by the bank. A. afterwards dies, having devised the property to B. and C.; who, becoming insolvent, make an assignment of all their estate and effects in trust for their creditors; and the trustees, with the sanction of the bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking company the 6000*l.* by yearly instalments. A fiat afterwards issues against B. and C., under which the bank prove for the whole amount of their debt, including the 6000*l.* On a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be paid into Court, subject to a further order. *Ex parte Smyth, re Steel*, 3 Dea. 597.

(As to Right of Creditor to Interest.)

A proof was rejected by a Commissioner, and a sum set apart and invested, under 1 & 2 Will. 4. c. 56. s. 31. On appeal, the Court allowed the proof; but held that the creditor was not entitled to the interest made by the investment. *Ex parte Jamieson, re Mitchell*, 3 M. & A. 715; S. C. 2 Dea. 6.

PROTECTION OF BANKRUPT.

If the bankrupt's last examination is adjourned *sine die*, and the Com-

bills of exchange, *B.* guarantees the payment of them, and afterwards *A.* and *B.* enter into partnership. When the first bill falls due, *A.* and *B.* remit to *C.* a portion of the amount, and solicit his indulgence for the remainder; and on a subsequent occasion, when another bill fell due, *A.* and *B.* wrote again to *C.* for indulgence, saying that they were arranging means to pay in full all liabilities resting on the business, and *C.* as well as others. *C.* returned no answer to these letters, but forbore to take hostile proceedings either against *A.* or *B.*, who afterwards became bankrupt. *Held*, that, in the absence of all direct evidence of the assent of *C.*, the separate debt was not converted into a joint debt, and could not be proved by *C.* against the joint estate. *Ex parte Hitchcock, re Worth*, 3 Dea. 507.

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joint. *Ex parte Law, re Bayley*, 3 Dea. 541.

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plaintiff; the plaintiff's executrix interfering in no way whatever to oppose the discharge. *Held*, that the discharge was not an extinguishment of the debt, and that the executrix could prove the amount of it under the fiat. *Ex parte Goodman, re Nainby*, 3 Dea. 631.

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(*Where Part of Debt received after Proof.*)

After the proof of a debt, but before the declaration of a dividend, the creditor received a large portion of the debt from a surety:—*Held*, that this did not prevent the creditor from receiving dividends on the whole amount of his proof. *Ex parte Copplestone, re Snell*, 3 Dea. 546.

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A., B., and C., carrying on business in partnership in premises belonging to A., A. executes a mortgage of the property to a banking

company, with a power of sale for securing 6000*l.*, the amount of advances to the partnership by the bank. A. afterwards dies, having devised the property to B. and C.; who, becoming insolvent, make an assignment of all their estate and effects in trust for their creditors; and the trustees, with the sanction of the bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking company the 6000*l.* by yearly instalments. A fiat afterwards issues against B. and C., under which the bank prove for the whole amount of their debt, including the 6000*l.* On a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be paid into Court, subject to a further order. *Ex parte Smyth, re Steel*, 3 Dea. 597.

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A proof was rejected by a Commissioner, and a sum set apart and invested, under 1 & 2 Will. 4. c. 56. s. 31. On appeal, the Court allowed the proof; but held that the creditor was not entitled to the interest made by the investment. *Ex parte Jamieson, re Mitchell*, 3 M. & A. 715; S. C. 2 Dea. 6.

PROTECTION OF BANKRUPT.

If the bankrupt's last examination is adjourned *sine die*, and the Com-

missioner indorses no protection on his summons, the bankrupt is not protected from arrest, although he may (previously to being arrested) have obtained an appointment from the Commissioner for a day to finish his last examination. *Ex parte Bailey, re Bailey*, 3 Dea. 43.

Quære, whether the Commissioner has the power, after such an adjournment, to indorse a protection, on any subsequent attendance of the bankrupt. *Ibid.*

The rule, protecting an uncertificated bankrupt from costs, applies only to petitions to annul the fiat. *Ibid.*

PROTECTION OF PAYMENTS.

See PAYMENTS.

PURCHASER.

See VENDOR AND PURCHASER.

REDUCTION OF PROOF.

See PROOF.

REFERENCE.

A marriage settlement having been lost, which declared the trusts of a fund belonging to the wife, and there being every probability that the petitioners were entitled to it, under the provisions of the settlement; they were, after being admitted to prove for the amount, allowed to receive the dividends, without a reference, as the fund was too small to bear that expense. *Ex parte Harrison, re Dornford*, 3 Dea. 25.

REGISTRAR'S REPORT.

See PRACTICE.

REHEARING.

Although the 1 & 2 Will. 4. c. 56. s. 32. directs, that the decision of the Court of Review, on any appeal from the Commissioner on a question of proof, shall be final, unless an appeal to the Lord Chancellor is lodged within a month,—the Court of Review, under special circumstances, permitted a case of this description to be reheard, notwithstanding the petition for rehearing was not presented until six months after the former hearing. *Ex parte Jackson, re Warwick*, 3 Dea. 651.

Where there is no variation between the minutes and the Order, as pronounced by the Court, the Court will not entertain an application to vary the minutes; the proper course for any party dissatisfied with the Order being to apply for a rehearing. *Ex parte Dolly, re Bowerman*, 3 Dea. 51.

RELATION TO ACT OF BANKRUPTCY.

And see SALE.

S., being sued by the defendant, paid money into Court in lieu of bail, on the 13th September, having omitted to put in bail, or pay the additional sum required as security for costs; the Court ordered the money to be paid to the defendant, on the 23d September; on the 9th, S. had committed an act of bankruptcy, and

on the 28th, a fiat was issued against him.—*Held*, that the assignees could not recover from the defendant the money so paid to him by order of the Court. *Reynolds v. Wedd*, 4 Bing. N. C. 694.

A bankrupt having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money:—*Held*, that the transaction, though *bona fide*, and without notice of an act of bankruptcy, was not protected by section 82 of 6 Geo. 4. c. 16; but that his assignees might recover the value in trover. *Wright v. Fearnley*, 5 Bing. N. C. 89.

RENTS.

An equitable mortgagee is entitled to the rents only from the order of sale, notwithstanding he has previously given notice to the tenants not to pay them to the bankrupt. *Ex parte Burrell, re Norman*, 3 Dea. 76.

Although an order for the sale of an equitable mortgage is accompanied by an order of reference to the Commissioners, to ascertain the time of the deposit of the deeds, yet if the certificate of the Commissioners agrees with the statement of the equitable mortgagee, he is entitled to the rents accruing from the date of the order. *Ex parte Thorpe, re Teasdale*, 3 Dea. 85.

Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before

the order for sale. *Ex parte Scott, re Pearson*, 3 Dea. 304.

REPUTED OWNERSHIP.

And see ORDER AND DISPOSITION.

An agreement was entered into between a firm in England, and another in America, that the latter should purchase American bank shares, and remit them to the English house for sale, drawing bills on the English house for the amount of the purchase-money; and the proceeds of the sale of the shares were to be applied by the English house in payment of the bills. Various bills were drawn by the American on the English house, and were negotiated by the former. Both houses became bankrupt, and the certificates of the bank shares did not arrive in England until after the bankruptcy of the English house, when they got into possession of the assignees.—*Held*, that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills, and that the shares were not within the operation of the clause of reputed ownership. *Ex parte Brown, re Clagett*, 3 Dea. 91.

Where the same person is secretary to two insurance companies, *quære*, whether his knowledge of a deposit of shares, acquired by him as secretary to one of the companies, amounts to notice to the other, so as to prevent the operation of the clause of reputed ownership. *Ex parte Bignold, re Theobald*, 3 Dea. 151.

The bankrupt agreed with *A.*, the managing director of a railway company, that certain shares belonging to the bankrupt should be a security for the payment of a bill accepted by *A.*, for the accommodation of the bankrupt, and which the bankrupt discounted with *B.*, with whom the certificates of the shares were deposited; but no formal notice to the company was given of this transaction, until four days before the fiat issued; nor was any transfer made of the shares in the books of the company, which were still standing in the bankrupt's name at the time of his bankruptcy. By the rules of the company, no shares could be transferred, without the consent of the directors; and *A.*, as managing director, received all applications for the transfer of shares.—*Held*, that the shares were not in the order and disposition, or reputed ownership, of the bankrupt. *Ex parte Harrison, re Medley*, 3 Dea. 185.

In an action by the owner of furniture let on hire to an hotel-keeper, who became bankrupt whilst it was in his possession, to recover damages from his assignees for seizing and selling it,—if the plaintiff rely on a custom for hotel-keepers to hire a portion of their furniture, the question for the jury will be, whether the custom is so general, as to raise a fair doubt and suspicion in the minds of persons trusting him, that the goods were not actually the goods of the bankrupt,—or, in other words, whe-

ther it is so general, that persons must be supposed to have known, that the goods, though in the possession, were not the property of the bankrupt. *Mullett v. Green*, 8 Car. & P. 382.

Goods allowed to be in the order and disposition of a bankrupt, as reputed owner, by the consent of his assignee, are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors' Court. *Butler v. Hobson*, 4 Bing. N. C. 290.

A bankrupt agreed to pay his creditors in full, and gave bills for the amount, and the creditors executed a power of attorney, to one *A. B.*, to receive their dividends for the bankrupt's use. The bills not being paid, and a second commission having issued,—*Held*, that the creditors, and not *A. B.*, were entitled to the dividends, and that the dividends were not in the reputed ownership of the bankrupt. *Ex parte Smither, re Govett*, 3 Mont. & A. 693; S. C. 1 Dea. 413.

Where a bankrupt pledges shares in a company, which belonged to his wife before marriage, notice of the transfer must be given to the company, before the act of bankruptcy; or they will be held to be in the reputed ownership of the bankrupt. *Ex parte Spencer, re Mitchell*, 3 Mont. & A. 697; S. C. 1 Dea. 468.

The bankrupt, on the 1st of March, deposited with the petitioner certificates of shares in a German mining

company, for securing a loan of money, with an agreement accompanying the deposit, by which he engaged to complete the transfer of the shares, when required. The petitioner sealed up these documents in a packet, which she entrusted to the bankrupt to keep in his iron safe, for better security; where the same remained until three weeks before the bankruptcy, when it was reclaimed by the petitioner. The bankrupt, long before his bankruptcy, told one of the directors of the company, that he had deposited the certificates with the petitioner; and this director, on the morning of the 7th December, communicated that fact to the board of directors; and in the evening of that day the act of bankruptcy was committed.—*Held*, that the shares were not in the reputed ownership, or in the order and disposition of the bankrupt, at the time of his bankruptcy. *Ex parte Ann Richardson, re Christopher Richardson*, 3 Dea. 496.

Seem, that the shares in a commercial company, possessing lands in a foreign country, for the purposes of trade, are not to be considered as real property. *Ibid*.

RE-SALE.

A person contracted to purchase an estate of the assignees for 5350*l*. and forthwith resold it for 5600*l*.; the assignees were ordered to convey to the sub-vendee. *Ex parte Anderson, re Manning*, 3 Mont. & A. 698; S. C. 1 Dea. 585.

REVERSING ADJUDICATION.

A creditor cannot petition to reverse the adjudication, under 1 & 2 Will. 4. c. 56. s. 17. *Ex parte Kilner, re Bryant*, 3 Mont. & A. 722; S. C. 2 Dea. 324.

REVIVOR.

A petition to revive a former order is of course, unless some hardship can be shown from such revivor. *Ex parte Evans*, and *Ex parte Ellis, re Evans*, 3 Dea. 381.

SALE.

And see RESALE.

(Of Bankrupt's Property previous to the Fiat, when affected by Act of Bankruptcy.)

The defendant, being in the employment of J. in his trade, sold *bond fide* some goods belonging to J., after J. had committed an act of bankruptcy, of which the defendant was ignorant. The sale was more than two months before the fiat issued. The defendant acted under a general authority. The assignee brought trover.—*Held*, 1st, on a plea of not guilty, that defendant, having sold under a general authority only, had been guilty of a conversion, and that if he had any justification, he should have pleaded it specially; 2nd, on an issue joined on a traverse of the assignees' possession,—that the plaintiff must recover, no evidence having been given that the purchaser was ignorant of the bankruptcy; sections 81 and 82 of the 6 Geo. 4. c. 16. protecting the transfer only, where

the party dealing with the bankrupt is without notice; and the burthen of proof being here on the defendant, who affirmed the sale. *Pearson v. Graham*, 6 Adol. & E. 899.

(Of Bankrupt's Property subsequent to the Fiat.)

Two of three assignees caused certain property of the bankrupt's to be sold, and executed a conveyance to the purchaser; but the third assignee declined to execute it, on the ground that the sale had taken place without his authority, and that he was not satisfied it was for the benefit of the estate. On a petition by the purchaser, for an Order on the third assignee to execute the deed, the Court refused such Order, without a previous reference to the Registrar, to inquire whether the sale was beneficial to the estate, and whether the conveyance was a fit and proper deed to be executed by the assignee. *Ex parte Underhill, re Bishton*, 3 Deac. 326.

SANCTION OF COURT.

And see COMPROMISE.

Scmble, the Lord Chancellor has jurisdiction to sanction an arrangement made by a bankrupt with his assignees, to submit to the commission, on payment to him of a certain sum out of his estate, and to order his assignees to pay to him a portion of that sum, in pursuance of such arrangement; the major part of the bankrupt's creditors, both in number

and value, having agreed to the arrangement at a meeting duly convened for that purpose. *Ex parte Jarrard, re Chambers*, 3 Dea. 1.

An estate is conveyed to trustees, upon trust, to permit the same to be occupied and used by *G. G.* for life, and after his death by *T. G.*, for his life, with remainders over; and it was provided, that the person, who should be entitled to the use and occupancy of the mansion-house, should reside and dwell therein, and use the name and arms of *G.*, upon pain of forfeiting all benefit under the settlement. In 1819 *T. G.* became bankrupt, and shortly afterwards obtained his certificate. At this time *G. G.*, the first tenant for life, was in possession of the property, and remained so till his death, in 1837; when *T. G.* entered on possession. — *Held*, that *T. G.* had such a life interest in remainder in this property, as passed to his assignee under his bankruptcy, liable to be defeated by the default of *T. G.* to comply with the conditions of the settlement; and that the Court would give its sanction to an agreement entered into between the bankrupt and assignees, by which a reasonable allowance was to be made to the bankrupt, to induce him to serve the estate, by continuing to reside in the mansion-house, and fulfilling the conditions of the settlement. *Ex parte Goldney, re Goldney*, 3 Dea. 570.

Order made, without a reference, confirming a compromise between a

bankrupt and his assignees, by which the bankrupt agreed to abandon all further litigation, with respect to the validity of the commission, in consideration of a sum of money paid to him out of the estate; such compromise being approved by more than three-fourths in number, and five-sixths in value, of the creditors who had proved, and also a considerable body of creditors who had not proved, under the commission; and none of the creditors dissenting. *In re Chambers*, 1 Mylne & C. 509.

SECOND FIAT.

See FIAT.

SERVANTS AND CLERKS.

A clerk, who voluntarily leaves his master twelve months before his bankruptcy, because he finds he is becoming insolvent, is not entitled to six months' wages in full, under the 6 Geo. 4. c. 16. s. 49. *Ex parte Gee, re Sawyer*, 3 Dea. 341. 563.

SET-OFF.

A declaration alleging that, in consideration that R., before his bankruptcy, would sell certain goods to the defendant, the defendant agreed to pay for the same prompt two months, or by an acceptance; and containing an averment of the delivery of the goods, and of the defendant's refusal to pay by an acceptance, or otherwise, whereby R., before he became a bankrupt, was deprived of the use and benefit of an acceptance, and of all the benefit which would have re-

sulted from discounting the said acceptance, and was put to great loss and inconvenience, and his estate, applicable to the discharge of his just debts, was, by reason of the non-payment for the said goods, much diminished in value,—does not sound in unliquidated damages, so as to deprive the defendant of his right of set-off under the Bankrupt Act, 6 Geo. 4. c. 16. s. 50. *Groom v. West*, 1 Perry & D. 19.

Assumpsit by assignees of S., a bankrupt, for money had and received to the use of the assignees since the bankruptcy. Plea, that before the bankruptcy, and before notice of any act of bankruptcy, the defendant gave credit to the bankrupt to the amount of 50*l.*, by indorsing for his accommodation, and without consideration, a bill of exchange for that amount, drawn by him, and payable to the bankrupt's order, and that such credit was of a nature likely to end in a debt. The plea then alleged, that the amount of the bill was paid by the defendant on its dishonour, after the bankruptcy, but before the commencement of the action, and the bankrupt thereupon became indebted to the defendant; that before the bankruptcy, S. drew a bill of exchange on the Chesterfield bank, and delivered it to the defendant, by way of loan, that he might raise the amount, and thereby gave credit to the defendant, to that amount; and that afterwards, before the bankruptcy, the defendant ob-

tained the amount of the said bill from the Chesterfield bank, and that he was ready and willing to set off the two sums against each other. Replication, that the defendant did not give credit to the defendant, and that *S.* was not nor is now indebted to the defendant *modus et forma*.—*Held*, that the plea showed such a giving of credit to the bankrupt within the statute 6 Geo. 4. c. 16. s. 50., as might be the subject of set-off in an action brought by the assignees. *Hulme v. Muggleston*, 3 Mees. & W. 30.

To a count for money had and received to the use of assignees of a bankrupt, the defendant pleaded, that although the money mentioned remained and was in the possession of the defendant after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession; that before, and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum, and that at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy.—*Held*, that this was not a good ground for a set-off (which the plea concluded with), and that the plea was therefore bad. *Wood v. Smith*, 4 Mees. & W. 522.

A. levies an execution against *B.*, and while in possession of the goods the landlord distrains them for rent, which *A.* pays, to relieve the goods from the distress. *A.* becomes bank-

rupt, having committed an act of bankruptcy before the levy; by which *A.*'s execution is defeated, and the assignees possess themselves of the goods.—*Held*, that the rent paid by *A.* to the landlord was so much money had and received by the assignees to their use, and might be set off by him against any demand of the assignees. *Ex parte Elliott, re Jermyn*, 3 Dea. 343.

SHARES IN JOINT STOCK COMPANY.

See JOINT STOCK COMPANY.

SHEEP-SALESMAN.

See TRADING.

SHERIFF.

A sheriff who levies execution on the goods of a defendant, who becomes bankrupt, on an act of bankruptcy committed before the execution, is liable in trover to the assignees of the bankrupt; notwithstanding he has no notice of the act of bankruptcy. *Garland v. Carlisle*, 4 Bing. N. C. 7; 3 Mees. & W. 152; 11 Bligh, 421; 4 Scott, 587; on appeal to the House of Lords; in which two last-mentioned reports the judgments are fully reported.

SOLICITOR.

As to Taxation of his Bill, see TAXATION.

If the solicitor to one of the parties to a petition, whose costs are ordered to be paid out of the estate, does not take in his bill in a reason-

able time, the funds, regardless of the bill, must be divided amongst the creditors. *Ex parte Monk, re Burford*, 3 Mont. & A. 626.

The solicitor to the fiat, who was a mortgagee of the bankrupt's estate, obtained leave to bid at the sale. But *quære*, whether he can have leave to purchase. *Ex parte Briggs, re Winchester*, 3 Dea. 238.

A solicitor may take out a fiat, as petitioning creditor, on the amount of his bill before it is taxed; but if after taxation it is reduced below 100*l.*, the fiat will be annulled. *Ex parte Ford, re Ford*, 3 Dea. 424.

(*Lien for his Costs.*)

The fund in Court being decreed to the assignees of a party, who in the course of the cause had become bankrupt, the solicitors employed by him, during part of the proceedings, have a lien for their costs. *Pounsey v. Humphreys*, 1 Coop. 142.

Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of their lien. *Ibid.*

SPECIAL CASE.

The counsel for the appellant, in applying for a special case, is bound to state to the judge who certifies it, the ground of appeal; and the case itself should state the facts found by the Court, and not the evidence at length, by which the facts were

proved. *Ex parte Wilson, re Bentley*, 3 Dea. 214.

Practice, as to obtaining approval of a judge to a special case. *Ex parte Woodward, re Turner*, 3 Dea. 303.

After a petition for annulling the fiat has been heard and disposed of by the Court of Review, the Lord Chancellor can only interfere in his appellate, and not in his original, jurisdiction in bankruptcy; and an appeal, to remove the order on such a petition, must be brought before him by way of special case, unless he shall otherwise direct; which direction will only be given under very special circumstances. *Ex parte Stubbs, re Hall*, 3 Dea. 549.

No appeal lies to the Lord Chancellor against the settlement of a special case by a judge of the Court of Review, for refusing to introduce into the case a statement of certain facts, which the appellant contended ought to be inserted in it; the 1 & 2 *Will.* 4. c. 56. s. 3. 17. confining the right of appeal to matters of law or equity, or the refusal or admission of evidence, only; and the 3d section declaring, that the determination of the judge in the settlement of the case shall be final and conclusive. *Ex parte Stubbs, re Hall*, 3 Dea. 549.

Lord Brougham's observations in *Ex parte Keys*, 1 Mont. & A. 242, 3 Dea. & C. 275, as to the Lord Chancellor's jurisdiction, in all matters relating to the fiat, being wholly untouched by the provisions of the 1 & 2 *Will.* 4. c. 56., corrected. *Ibid.*

Where a petition of appeal was presented to the Lord Chancellor, after one of the judges of the Court of Review had refused to certify a special case, on the ground that the question was one of fact, the petition was dismissed, with costs. *Ex parte Woodward, re Turner*, 3 Dea. 293.

SPECIFIC PERFORMANCE.

Where the common order is made for the sale of the bankrupt's estate, on the petition of an equitable mortgagee, the Court of Review has jurisdiction to compel the purchaser specifically to perform his contract, and for that purpose to refer it to the Registrar of the Court, to inquire whether the vendors can make a good title to the property. *Ex parte Brettell, re Goren*, 3 Dea. 111. But see *post*.

The Court of Review has not jurisdiction to order the specific performance of a contract, against a purchaser at a sale, which took place under the common order made by that Court, on the petition of an equitable mortgagee. *Ex parte Cutts, re Goren*, 3 Dea. 242.

STATUTE OF LIMITATIONS.

A payment, by one of two joint makers of a promissory note, of any interest due on the note, prevents the other joint maker from availing himself of the Statute of Limitations. *Ex parte Woodward, re Turner*, 3 Dea. 290.

A. and *B.* make a joint promissory

note; ten years after the date of which, *B.* executes an assignment of his property, in trust for his creditors, under which a dividend is paid to the holder of the note; *A.* becomes bankrupt.—*Held*, that the payment of the dividend under *B.*'s assignment, being after the Statute of Limitations had already run, did not revive the debt, against *A.*, so as to enable the holder to prove on the note, under the fiat against *A.* *Ex parte Woodward, re Turner*, 3 Dea. 294.

STATUTES.

(Construction of.)

Quære, Whether section 110 of 6 Geo. 4. c. 16. be retrospective. *Green v. Weston*, 3 Mont. & A. 414.

The 127th section of 6 Geo. 4. c. 16.,—which vests in the assignees all the future estate and effects of a bankrupt, who does not pay 15*s.* in the pound under his second commission, in his assignees,—is retrospective. *Young v. Rishworth*, 3 Nev. & P. 585.

The 6 Geo. 4. c. 16. s. 127. enacts, that where a person, who has obtained his certificate, shall again become bankrupt, and *have obtained*, or shall hereafter obtain, such certificate as aforesaid,—unless his estate shall produce sufficient to pay his creditors 15*s.* in the pound, his future effects shall vest in his assignees.—*Held*, that that enactment applies only to bankruptcies happening *after* the passing of the act. *Guthrie v. Bowcher*, 8 Sim. 248.

STAYING ADVERTISEMENT.

See ADVERTISEMENT.

STAYING CERTIFICATE.

See CERTIFICATE.

STAYING FIAT.

See FIAT.

SUBSTITUTION OF DEBT.

See PETITIONING CREDITOR.

SUITS IN EQUITY.

And see ACTIONS.

At a meeting of creditors to decide on referring disputes to arbitration, and commencing suits in equity, a creditor may consent by proxy, under the 6 Geo. 4. c. 16. s. 88. *Ex parte Belcher, re Bannatyne*, 3 Dea. 98.

The assignees of a bankrupt having sold his estate, whilst he was proceeding to get his commission superseded, he filed a bill against them and the purchaser and their respective solicitors, charging them with fraud and collusion in the sale, and alleging that he had settled with all his creditors, and that they had consented to the commission being superseded. A demurrer to the bill, on the ground that the plaintiff was an uncertificated bankrupt, was overruled. *Lantorn v. Holcombe*, 8 Sim. 76.

A bill was filed by an insolvent debtor against *A.* (who was in possession of an estate claimed by him) and his assignees, alleging that the assignees had refused to sue for the estate, because they were apprehensive of incurring personal expenses; but that

they were willing to concur in a sale of it for the benefit of the plaintiff and his creditors,—and that, if the estate were sold, the proceeds would be sufficient to pay the creditors, and to leave a considerable surplus; and praying, that *A.* might be declared to be a trustee of the estate for the plaintiff and his creditors, and that it might be sold and the proceeds paid to the assignees, and that *A.* might be restrained from proceeding with an action which he had brought against the plaintiff. A demurrer to the bill was overruled. *Kaye v. Fosbrooke*, 8 Sim. 28.

The institution of a suit under section 88 of the Bankrupt Act, 6 Geo. 4. c. 16., may be authorized by creditors present by attorney, as effectually as by creditors present in person. *Bannatyne v. Leader*, 3 Mylne & C. 379; *S. C. Ex parte Belcher*, 3 Mont. & A. 448.

The official assignee of a bankrupt's estate filed a bill against the respective personal representatives of two successive assignees, for an account and payment of monies, which, having formed part of the bankrupt's assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The monies consisted partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both the assignees died before the passing of the 6 Geo. 4. c. 16. The bill was filed in 1834,

and in the following year the 5 & 6 Will. 4. c. 29. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified.—*Held*, that the official assignee was competent to maintain such a suit, and that the particular creditors to whom the unclaimed dividends had been allotted, and the Attorney-General, were not necessary parties in it. *Green v. Weston*, 3 Mylne & C. 385; S. C. 3 Mont. & A. 414.

SUPERSEDEAS.

The Court refused to supersede a commission issued twenty-six years ago, on the mere application of an uncertificated bankrupt; although 20s. in the pound had been paid to the creditors, and all the Commissioners and assignees were dead. *Ex parte Ward, re Ward*, 3 Dea. 39.

SURETY.

And see GUARANTEE.

An insolvent is not, by his discharge under the Insolvent Debtors' Act, released from an action at the suit of his surety, for money paid after the discharge, in respect of an annuity granted by the insolvent before. *Hocken v. Browne*, 4 Bing. N. C. 400.

A. accepted four bills for the accommodation of *B.*, which *B.* indorsed and deposited with his bankers, as a collateral security for his floating balance with them. *B.* became

bankrupt; when the bankers proved for a balance greatly exceeding the amount of the bills, excepting the bills, among others, as securities then held by them; and they afterwards received a dividend of 2s. in the pound on the amount of their proof. The bills were subsequently paid in full by *A.*—*Held*, that the bankers were not bound to refund to *A.* the dividend of 2s. on the amount of the bills; and that *A.* was only entitled to stand in their place, in respect of any future dividends on the bills. *Ex parte Holmes, re Garner*, 3 Dea. 662.

A. grants an annuity to *C.*, and *B.*, as the surety of *A.*, jointly and severally covenants with *C.* to pay the annuity; provided, if default should be made in payment of the annuity by *A.*, *C.* would give *B.* notice in writing of so much of the annuity as might be in arrear, twenty-one days previous to the adoption of any measures against *B.*, to enforce the payment of them. *B.* becomes bankrupt, before any default is made by *A.* in the payment of the annuity.—*Held*, that *C.* could not prove for the value of the annuity, under the provisions of the 6 Geo. 4. c. 16. s. 54. *Ex parte Marks, re Colnaghi*, 3 Dea. 133.

TAXATION OF COSTS.

Quære, Whether a petition to tax the petitioning creditor's bill of costs must be served on him? *Ex parte Moore, re Cartwright*, 3 Mont. & A. 699; S. C. 1 Dea. 578.

A petition to the general jurisdiction of the Court, for taxation of a bill of costs, must set out objectionable items; and a general reference to the bill of costs is not sufficient. *Ibid.*

If the petition state, as objectionable, items already disallowed by the Commissioner, it is insufficient; but it seems, that it may stand over to be amended. *Ibid.*

The right of a 20l. creditor to re-tax costs, under 6 Geo. 4. c. 16. s. 14., is confined to costs after the choice of assignees. *Ibid.*

A petition by a creditor to re-tax the petitioning creditor's bill, which has been paid two years, will lie, if the creditor has but lately proved. *Ibid.*

A charge in a solicitor's bill, for attendance to prevail on certain creditors to vote in the choice of assignees, and for the preparing proofs for that purpose, renders the whole bill liable to taxation. *Ex parte Davis, re Sherry*, 3 Dea. 320.

It is not multifarious, to pray for the taxation both of the solicitor's and messenger's bills; but the petitioner should not pray costs against the messenger. *Ex parte Pring, re Davis*, 3 Dea. 322.

One of three assignees, who was also a creditor of the bankrupt, requested the Commissioners to tax the bills of the solicitor to the fiat, amounting to 2191l., most of which the Commissioners declined to tax, but professed to tax four of them,

and then made an order on the assignees for payment of the amount. — *Held*, that the assignee was not estopped,—by having joined his co-assignees in the payment of the bills, pursuant to the order of the Commissioners,—from applying to the Court for an Order for taxation; and that he was entitled to such Order, as well in his character of assignee, as in that of a creditor, of the bankrupt. *Ex parte Fosbrooke, re Fisher and Simmonds*, 3 Dea. 686.

TRADING.

A farmer, who was in the habit of buying from time to time half as many more sheep as was necessary to stock his farm, and of selling the surplus at a profit, is a trader within the bankrupt law, as a sheep salesman. *Ex parte Newall, re Newall*, 3 Dea. 333.

TROVER.

See ACTIONS.—SHERIFF.

TRUSTEE.

(*Under a Trust Deed for the Benefit of Creditors.*)

The petitioner struck a docket against the bankrupt, which he afterwards abandoned, and entered into an arrangement, by which the bankrupt assigned all his property to the petitioner, in trust for himself and the other creditors. After the petitioner had taken possession of the bankrupt's property, and incurred some expense in the execution of the trusts, another creditor sued out a fiat against

the bankrupts, under which the assignees seized the bankrupts' property in the hands of the petitioner. —*Held*, that the petitioner had no lien on the property, as against the assignees; the docket struck by himself being *prima facie* evidence of his having notice of an act of bankruptcy prior to the trust assignment, and the assignment itself amounting to an act of bankruptcy. *Ex parte Swinburne, re Field*, 3 Dea. 396.

It is not because the name of a creditor is inserted as one of the trustees in a trust deed, that the firm, of which he is a partner, cannot sue out a fiat as petitioning creditors, if the deed was not executed by himself, nor any member of the firm. *Re Wood*, 3 Dea. 514.

(*Bankrupt Trustee.*)

On a petition, under 6 *Geo.* 4. c. 16. s. 79., for appointing a new trustee, the bankrupt, if served, is entitled to the costs of his appearance. *Ex parte Whitley*, 3 Mont. & A. 696; *S. C.* 1 Dea. 478.

Practice as to confirming the Registrar's report, on a reference to appoint a trustee. *Anon.* 3 Dea. 223; *S. C.* *Ex parte Masefield, re Brooks*, 3 Mont. & A. 487.

UNCLAIMED DIVIDENDS.

The Court of Review has no power to order any payment out of unclaimed dividends, or of the interest made from them. *Ex parte Gregg, re Walmsley*, 3 Dea. 308.

Order as to payment of unclaimed dividends by the executrix of an assignee. *Ex parte Raikes, re Take*, 3 Dea. 494.

The official assignee of a bankrupt's estate filed a bill against the respective personal representatives of two successive assignees, for an account and payment of monies, which, having formed part of the bankrupt's assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The monies consisted, partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both the assignees died before the passing of the 6 *Geo.* 4. c. 16. The bill was filed in 1834; and in the following year the 5 & 6 *Will.* 4. c. 29. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified. — *Held*, that the official assignee was competent to maintain such a suit, and that the particular creditors, to whom the unclaimed dividends had been allotted, and the Attorney General, were not necessary parties to it. *Green v. Weston*, 3 Mylne & Craig, 385; *S. C.* 3 Mont. & A. 414.

UNLIQUIDATED DAMAGES.

See PROOF.—SET-OFF.

USE AND OCCUPATION.

See LEASE.

USURY.

The petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period at the option of the bankrupt, but so as not to exceed the period of eighteen months in the whole; the bankrupt undertaking to pay 7½*l.* per cent. interest, and 3*l.* per cent. for insurance. The note was renewed four times successively; and, on each renewal, the same rate was deducted for interest and insurance.—*Held*, that this transaction was not protected by the 3 & 4 *Will.* 4. c. 98. s. 7. (which allows any interest to be taken on a bill or note not having more than three months to run,) and was consequently usurious, and the note incapable of proof. *Ex parte Terrewest, re Poynter*, 3 Dea. 590.

VENDOR AND PURCHASER.

Where the common order is made for the sale of the bankrupt's estate, on the petition of an equitable mortgagee, the Court of Review has jurisdiction to compel the purchaser specifically to perform his contract, and for that purpose to refer it to the Registrar of the Court, to inquire whether the vendors can make a good title to the property. *Ex parte Brettell, re Goren*, 3 Dea. 111. But see *post*.

The Court of Review has not jurisdiction to order the specific performance of a contract against a purchaser at a sale, which took place under the

common order made by that Court, on the petition of an equitable mortgagee. *Ex parte Cutts, re Goren*, 3 Dea. 242.

Two of three assignees caused certain property of the bankrupt's to be sold, and executed a conveyance to the purchaser; but the third declined to execute it, on the ground that the sale had taken place without his authority, and that he was not satisfied it was for the benefit of the estate. On a petition by the purchaser for an Order on the third assignee to execute the deed, the Court refused such Order, without a previous reference to the Registrar, to inquire whether the sale was beneficial to the estate, and whether the conveyance was a fit and proper deed to be executed by the assignee. *Ex parte Underhill, re Bishton*, 3 Dea. 326.

A person contracted to purchase an estate of the assignees for 5350*l.*, and forthwith resold it for 5600*l.*; the assignees were ordered to convey to the sub-vendee. *Ex parte Anderson, re Manning*, 3 Mont. & A. 698; *S. C.* 1 Dea. 585.

VIVÂ VOCE EXAMINATION.

On a petition by the bankrupt to annul the fiat, for want of the proper requisites, where the affidavits are diametrically opposite as to the facts, the Court will direct either a *vivâ voce* examination, or an issue; which, if taken by the bankrupt, will be under his liability to the costs. *Ex parte Bunn, re Bunn*, 3 Dea. 120.

Where a *vivâ voce* examination is ordered, as to the act of bankruptcy, the assignees must give notice of what act of bankruptcy they rely on; but they are not bound to furnish a list of witnesses. *Ex parte Foster, re Foster*, 3 Dea. 175.

On a *vivâ voce* examination, affidavits cannot be read in evidence. *Ibid.*

Practice of the Court, as to directing a *vivâ voce* examination. *Ex parte Tate, re Odlin*, 3 Dea. 516.

VOLUNTARY CONVEYANCE.

A deed of assignment by an insolvent of all his effects, for the benefit of his creditors, executed during his imprisonment, without consideration, and without pressure from any creditor, is voluntary, and void under the 7 Geo. 4. c. 57. s. 32. *Binns v. Towsey*, 3 Nev. & P. 88.

Where a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor, in pursuance of a *bond fide* demand by the creditor, it is not voluntary, within the meaning of the 7 Geo. 4. c. 57. s. 32.; and it is not necessary, in order to support it, that there should have been *pressure* on the part of the creditor, or an apprehension on the part of the insolvent, that by not making

it, he should be in a worse condition. *Mogg v. Baker*, 4 Mees. & W. 348.

WAGES.

Sec SERVANTS AND CLERKS.

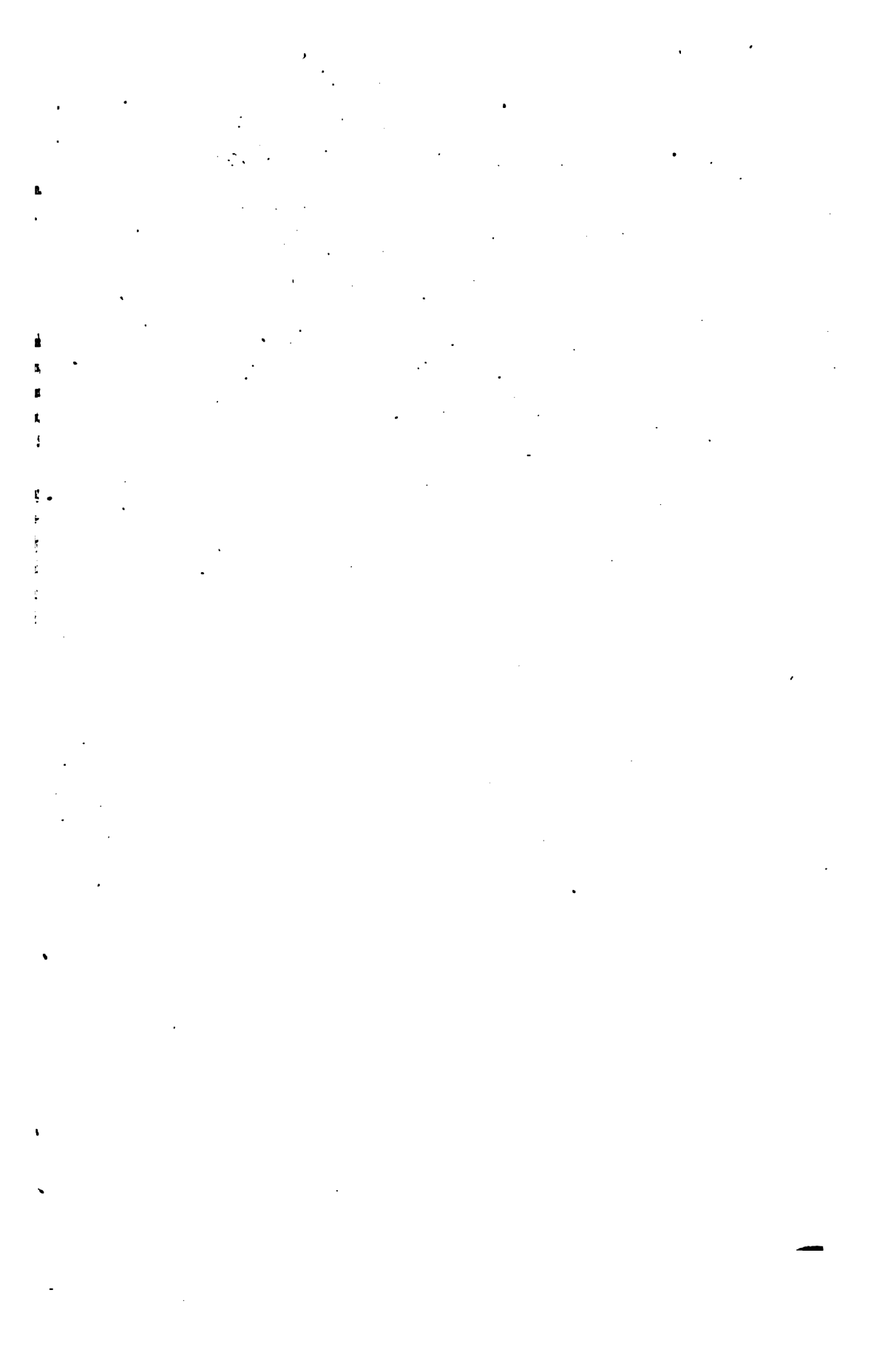
WARRANT.

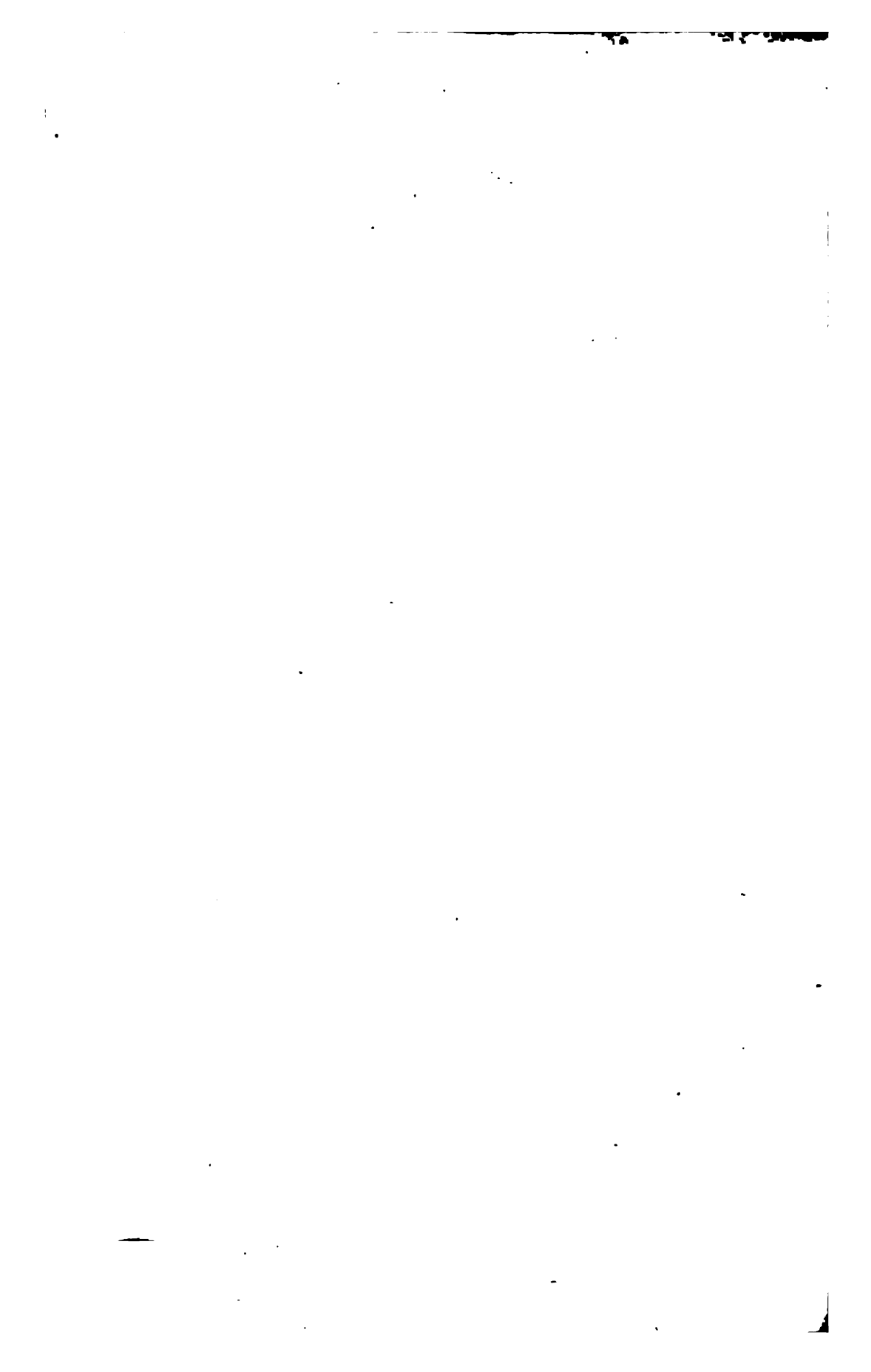
The Court will not interfere with the discretion of the Commissioners, by directing them to sign a warrant for the apprehension of the bankrupt, who had absconded. *Re Creed*, 3 Dea. 38.

No warrant should issue to bring the bankrupt before the Commissioners, unless he has been specially summoned, or unless the forty-second day has passed without his having surrendered. *Re Creed*, 3 Mont. & A. 725.

WITNESS.

A. and *B.* being in partnership, *A.* retires from the concern in favour of *C.*, who agrees to execute a bond to indemnify *A.* from the debt owing by *A.* and *B.* Subsequently, a separate fiat issues against *B.* On a suit instituted by *A.* against *C.* to compel a specific performance of his agreement to execute the bond of indemnity, it was held, that the evidence of *B.*, who had not obtained his certificate, was not admissible to prove the agreement. *Warren v. Taylor*, 1 Cooper, 174.





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